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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND and
CONNIE J. ENGLAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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KENNETH D. ENGLAND and CONNIE J. ENGLAND,
Petitioners,

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UNITED STATES OF AMERICA,
Respondent.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 39-43) is reported at 345 F. 2d 414 (7th Cir. 1965) and is reprinted in Appendix A, *infra,* pp. 1a-7a.* The opinion of the

*References to "R." are to the certified transcript of the record in this case, which includes the printed Appendices to Respondent's and Petitioners' briefs in the Court of Appeals. Because the Clerk of the Court of Appeals did not exclude from the record the briefs on appeal and did not paginate the record, counsel for petitioners have paginated the record in this case as follows: Appendix A to Respondent's Brief is numbered R. 1-3; Appendix B to Respondent's Brief is numbered R. 4-32; the Appendix to Petitioners' Brief is numbered R. 33-38; and the opinion and judgment of the Court of Appeals is numbered R. 39-43. For the convenience of the Court, we have filed nine additional copies of the Appendices to the briefs on appeal, the pages of which have been numbered the same as the corresponding portion of the certified transcript.

United States District Court for the Southern District of Illinois (R. 12-30) is reported at 226 F. Supp. 762 (S. D. Ill. 1964) and is reprinted in Appendix B, *infra,* pp. 1b-21b.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra,* p. 7a) was entered on April 29, 1965 (R. 43). By order of Mr. Justice Clark, entered July 14, 1965, the time for filing this Petition for a Writ of Certiorari was extended to and including September 24, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

Whether an employee who is transferred to a new job location by and at the direction of his employer must include in gross income amounts received from his employer in reimbursement for extraordinary moving expenses necessarily incurred by the employee solely as a result of his job transfer. Alternatively, if the employee must include such reimbursed expenses in gross income, whether the employee is entitled to deduct such expenses as ordinary and necessary business expenses.

STATUTES AND REGULATIONS INVOLVED

The statute involved with respect to the includibility in income of the reimbursed expenses is section 61(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 61(a), which provides in pertinent part:

> "SEC. 61. GROSS INCOME DEFINED.
>
> "(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means

all income from whatever source derived, including (but not limited to) the following items:

> "(1) Compensation for services, including fees, commissions, and similar items; . . . ."

There are no regulations directly applicable to the issue here presented under section 61(a).*

The statute involved with respect to the alternative question of the deductibility of the employee's expenses if the reimbursement is includible in income is section 162(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 162(a), which provides in pertinent part:

> "SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> "(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * *
>
> "(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; . . . ."

There are no regulations directly applicable to the issue here presented under section 162(a).

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*All section references are to the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The material facts in this case are undisputed and are as follows:

For seven years prior to May 19, 1960, petitioner Kenneth D. England* was employed by The Aetna Casualty and Surety Company (the "Company") at its Kansas City, Missouri, office, and resided in that city with his wife in a home owned by them (R. 12). On May 19, 1960, England was advised by the Company that, effective June 1, 1960, he was being permanently transferred to its Springfield, Illinois, office, but on his request he was allowed some additional time before the transfer (R. 12-13, 39-40). England in fact arrived in Springfield on June 19, 1960, and took up his new duties on June 20, 1960 (R. 13). England then commenced looking for a permanent place to live with his family in the Springfield, Illinois, area and on July 9, 1960, he leased a house which was unavailable for occupancy until August 1, 1960, at which time England and his family moved in (R. 13-14, 39-40).

Between June 19 and August 1, 1960, England incurred expenses of $446 for which he was reimbursed by the Company under its written program covering reimbursement of transferred employees for moving, traveling and duplicated living expenses (R. 14). A copy of such written program was appended to the District Court opinion (R. 26-30) and appears in Appendix B, *infra,* at pp. 17b-21b. The principal items for which England was reimbursed by the Company were for his food and lodging expenses in

*Petitioner Connie J. England is the wife of Kenneth D. England and is a petitioner in this case only because she and her husband filed a joint return for the taxable year in issue. References to England refer to petitioner Kenneth D. England only.

Springfield, Illinois, during the period his family remained in Kansas City prior to their occupancy of permanent living quarters at the new location and for the cost of a trip to Springfield by England's wife to inspect and select among houses available for permanent living quarters (R. 14-15 fn. 1).* The Company also bore the expense of moving England's household effects and the cost of his wife's transportation at the time of the permanent move, but under the rules set forth in Rev. Rul. 54-429, 1954-2 C. B. 53, the Government did not contend that reimbursement for such items constituted income to England (R. 16-17, fn. 2).

The Company's reimbursement program was not to compensate for services rendered, but was designed to prevent or reduce financial loss sustained by transferred employees because of traveling and duplicated living expenses arising from their transfer (R. 20). All of the expenses for which the Company reimbursed England were of an extraordinary nature required to be incurred by the Company (R. 23). Petitioners suffered an actual financial loss as a result of the transfer and their net worth showed a decrease in 1960 because of the transfer (R. 20).

In their 1960 income tax return, petitioners did not include in income any portion of the $446 reimbursed to England by the Company. After audit of such return, the Commissioner of Internal Revenue increased petitioners' taxable income by said $446, resulting in an additional tax for 1960 of $103. Petitioners paid the additional tax, filed a claim for refund which was rejected and thereupon filed

*Such principal items aggregated more than $400. Other expenses, such as for laundry, a newspaper advertisement to rent a house and incidental costs involved in the sale of his Kansas City house, increased the amount for which England claimed reimbursement from the Company to $494.60. The Company allowed reimbursement for $452.83, and the parties have agreed that $446 should be regarded as such reimbursement for the purposes of this case (R. 14-15, fn. 1).

suit for refund in the District Court for the Southern District of Illinois (R. 40). The jurisdiction of District Court was founded on 28 U. S. C. § 1346(a)(1). The District Court held that the $446 for which England was reimbursed was not includible in income and entered judgment for petitioners (R. 12-31). The Court of Appeals reversed (R. 39-43).

REASONS FOR GRANTING THE WRIT

I. The Question Affects Tens of Thousands of Taxpayers Annually.

More than 150,000 employees were transferred within the United States by their corporate employers during 1964, and it is likely that the number of transfers will increase in 1965 and future years.[1] The expanding volume of employee transfers has resulted from the expansion and decentralization of American industry since the end of World War II, with the concomitant need to staff new plants or fill vacancies at distant locations.[2]

Recognizing that substantial costs are involved in the moving of a household, virtually all companies bear or reimburse the employee for part or all of the extraordinary expenses necessarily incurred in connection with his job transfer. Employers do not bear such costs to compensate their employees. Indeed, officials of the two principal employment divisions of the Government have so stated. The Assistant Secretary of Defense, Mr. Norman S. Paul, has advised the Internal Revenue Service that dislocation allowances paid to transferred military personnel to cover temporary

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[1]See *Closeup: Management's Moving Man,* Chemical Week, May 22, 1965, p. 87.

[2]See *"We've Been Transferred,"* Fortune, July 1957, p. 116; *Americans on the Move to New Jobs, New Places,* Life, Feb. 3, 1958, p. 85.

living costs are "not intended to be compensatory."[3] Similarly, the Chairman of the United States Civil Service Commission, Mr. John W. Macy, Jr., observed in a letter to the Speaker of the House of Representatives in support of legislation authorizing reimbursement to transferred Civil Service employees of expenses such as were reimbursed to England that such expenses should be reimbursed by the employer because the employer "rather than the employee is both the initiator and the prime beneficiary of the move."[4]

The Internal Revenue Service (the "Service") has also partially recognized the true nature of such reimbursements, holding in a 1954 ruling that employer reimbursement to an employee "for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer," does not constitute compensation and is not includible in gross income under the 1939 Code predecessor provision of section 61(a) because such reimbursement "is not compensatory in nature."[5] On the other hand, as a result of the decision below the Service has held that reimbursements for other expenses incurred as a result of the employer-directed move, including those for which England was reimbursed, are includible in gross income and are subject to withholding.[6] As we hereinafter show, the position of the Service in its recent ruling is contrary to the position of the Tax Court (*John E. Cavanagh*, 36 T. C. 300 (1961)) and may irrevocably prejudice tens of thousands of taxpayers.

[3]Letter from Norman S. Paul, Assistant Secretary of Defense for Manpower, to Bertrand M. Harding, Acting Commissioner of Internal Revenue, reported in Bureau of National Affairs, *Daily Report for Executives, Developments Affecting Taxation and Finance*, No. 169, p. G-1 (August 28, 1964).

[4]Letter from John W. Macy, Jr., Chairman of the United States Civil Service Commission, to the Honorable John W. McCormack, Speaker of the House of Representatives, dated May 20, 1965.

[5]Rev. Rul. 54-429, 1954-2 C. B. 53.

[6]Rev. Rul. 65-158, I. R. B. 1965-24, 6.

Although the expenses which companies will bear vary, the vast majority of employers reimburse employees transferred at the employer's behest for temporary food and lodging costs of the type incurred by England and for the cost of permitting the employee's wife to select a new home. A 1964 survey by the American Management Association covering 256 of the largest companies in the country revealed that 223 firms, or 87 percent of the total, reimbursed transferred employees for temporary food and lodging expenses of the type for which England was reimbursed.[7] Earlier studies by the National Industrial Conference Board[8] (involving 151 companies) and Greyvan Lines Incorporated[9] (involving 688 companies) likewise indicated that between 80 percent and 87 percent of all companies reimburse transferred employees for such temporary duplicated living expenses. The studies further reveal that most companies also reimburse the transferred employee for a house selection trip such as England's wife made.

On the basis of these figures, it seems fair to estimate that the question of includibility in income of the reimbursed expenses involved in this case affects the income tax liability of at least 50,000 and perhaps more than 100,000 of the 150,000 employees annually transferred by private industry.[10] In addition, the question also affects approximately 340,000 military personnel who are transferred an-

[7]American Management Association Research Study 67, *Reimbursing Personnel for Transfer and Relocation Costs* (1964).

[8]National Industrial Conference Board, Inc., Studies in Personnel Policy, No. 154, *Company Payment of Employees' Moving Expenses* (1956).

[9]Greyvan Lines Incorporated, *What Other Companies Do and What Their Employees Think They Should Do* (1957).

[10]Although there are no figures available to indicate the percentage of transferred employees who incur costs for temporary food and lodging expenses or for a house selection trip, it appears likely from the relative uniformity of company reimbursement policies that the overwhelming majority of transferred employees do incur such costs.

nually and receive dislocation allowances.[11] Finally, if the legislation now pending[12] before the Congress for reimbursement to transferred Civil Service employees of the type of expenses here involved is enacted, as seems likely,[13] another 35,000 Civil Service employees will be annually affected by the outcome of this case.[14] As the Government advised the Court of Appeals below, the issue here presented affects "the rights of thousands of taxpayers" and "is an extremely important one."[15]

Not only are many thousands of taxpayers annually affected by the employee transfer expense issue here involved; a good number of them may be irrevocably prejudiced by the action which the Service has taken following the Court of Appeals decision below. On June 14, 1965, the Service in reliance on the Court of Appeals decision below published a ruling requiring employers to withhold income tax on reimbursements of expenses of the type here involved.[16] The ruling wholly ignores the Tax Court deci-

[11]Letter from Norman S. Paul, Assistant Secretary of Defense for Manpower, to Bertrand M. Harding, Acting Commissioner of Internal Revenue, reported in Bureau of National Affairs, *Daily Report for Executives, Developments Affecting Taxation and Finance*, No. 243, p. G-1 (December 15, 1964).

[12]H. R. 10607, 89th Cong., 1st Sess. (1965).

[13]The bill was recommended by the President. See Message from the President of the United States, May 12, 1965, 111 *Cong. Rec.* 9884 (1965) (H. Doc. No. 170, 89th Cong., 1st Sess.).

[14]John W. Macy, Jr., Chairman of the United States Civil Service Commission, *Hearings Before the Subcommittee on Executive and Legislative Reorganization of the House Committee on Government Operations on H. R. 10607*, 89th Cong., 1st Sess., stenographic transcript, p. 23 (Sept. 1, 1965).

[15]Brief for Appellant United States of America in the Court of Appeals for the Seventh Circuit, p. 8.

[16]Rev. Rul. 65-158, I. R. B. 1965-24, 6. Apparently dissatisfied with compliance with the ruling, the Service on August 9, 1965, issued Technical Information Release 754 reminding "employers that certain moving expense reimbursements or allowances they pay to or on behalf of employees transferred primarily in the employer's interest are subject to withholding of employment taxes." See Announcement 65-65, I. R. B. 1965-36, 14.

sion in *John E. Cavanagh,* 36 T. C. 300 (1961), the only other decision expressly considering the issue, which ruled that such reimbursements were not includible in income.[17]

It is clear that most employees who receive a W-2 Form reflecting such reimbursed expenses as income will never know that the includibility of such reimbursements in income is an open issue which they may question.[18] A survey by counsel for petitioners of the 1964 experience of ten companies with 515,000 employees showed that of 3,714 employees who were transferred, 2,345 (63.1%) earned under $10,000 and 3,447 (92.8%) earned under $15,000.[19] Employees at such income levels generally have no knowledge of refined tax issues and few can afford or obtain the services of tax experts.

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[17]The Government did not appeal the *Cavanagh* decision, but nevertheless refuses to follow it. 1962-2 C. B. 6. Subsequent to the Court of Appeals decision in this case, District Judge Poos who had decided this case decided a similar case, *Logan* v. *United States,* 65-2 U. S. Tax Cas. ¶ 9554 (S. D. Ill. 1965), in favor of the Government because his decision was "controlled by *England* v. *United States. . . .*" On July 26, 1965, Judge Poos vacated and set aside the judgment in the *Logan* case upon being advised that petitioners in this case intended to seek Supreme Court review. 65-2 U. S. Tax Cas. ¶ 9608. Judge Poos reasoned that since the *Logan* case involved the same issues as the *England* case, if the Supreme Court should reverse the Court of Appeals in *England,* the *Logan* case would not have to be appealed.

[18]This is the more so since the instructions which accompanied the 1964 individual income tax returns (U. S. Treasury Department, Internal Revenue Service Form 3903) and *Your Federal Income Tax* (U. S. Treasury Department, Internal Revenue Service Publication No. 17, p. 46 (1965 ed.)), an official Treasury Department publication for the guidance of taxpayers, unqualifiedly state that such reimbursements must be included in income.

[19]A witness before the Senate Finance Committee in 1963 testified that 85 percent of employees reimbursed for moving expenses by one large corporation and 91 percent of those of another earned less than $15,000 a year. Almost none of the other employees transferred by these two corporations earned more than $25,000 a year. Statement of Richard B. Barker, *Hearings Before the Senate Committee on Finance on H. R. 8363,* 88th Cong., 1st Sess. (1963) Part 4, p. 2008.

Thus, not only will each year's delay in the establishment of governing rules mean that the statute of limitations will have run on the refund rights of tens of thousands of taxpayers, the failure promptly to establish such rules presents an unusual and more troublesome problem: even if the rules developed several years hence exclude from income reimbursements such as England's, most of the many thousands of taxpayers who will have paid their taxes unaware of the issue and who still are entitled to refunds will not be in a position even to learn of these rules, or having learned of them, will be unaware of their application to themselves.

Furthermore, of the minority of taxpayers who may be aware of the questionable nature of the Service's position, few will have any practical remedy until the governing rules are finally established by this Court. The amount of expenses reimbursed to a single employee and asserted by the Service to be includible in his income is generally modest. So also generally is his income tax bracket. Thus, the amount of tax involved in the usual case is not more than a few hundred dollars—the $103 involved here is typical.[20] Consequently, the amount at stake, while important to the ordinary taxpayer, is not sufficient to warrant the cost of his challenging the Service in the courts. Only if the employer is willing to bear the costs of litigation—as the Company is doing here because of the importance of the case—is the typical employee in a position to challenge the Service.

The issue presented here is of continuing importance for current and future taxable years and is in no way

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[20]It may also be noted, as illustrative, that income tax deficiencies arising from reimbursed moving expenses have been assessed against 229 employees who were transferred from Chicago, Illinois to Springfield, Illinois by Illinois Bell Telephone Company in connection with the relocation of an entire department. Over 80 percent of those 229 employees received annual wages of less than $12,000.

affected by the addition to the Internal Revenue Code, by the Revenue Act of 1964, of a new section 217, dealing with moving expenses. Such section provides for a deduction for reimbursed moving expenses of new employees and non-reimbursed moving expenses of all employees to the extent that the Internal Revenue Service had previously held that the reimbursement to an existing employee was not includible in income. In adopting the new statutory provision, the Congress expressly noted the existence of the Tax Court decision in *Cavanagh* and stated that the enactment of section 217 was not meant to imply that "moving expense exclusions under existing law are necessarily limited" to the categories covered by section 217. "The question of whether the exclusion for existing employees extends beyond these three categories is left for judicial interpretation."[21]

The time for such judicial interpretation on a final, national basis is now. It is now because of the conflict between the Tax Court and the Seventh Circuit. It is now because tens of thousands of taxpayers annually are affected by the tax question here in issue. And, most important, it is now because enforcement of the Service's income tax withholding policy will mean that many thousands, unaware of and unable to preserve their rights, will inevitably and irrevocably pay taxes that may ultimately prove not to have been due.

II. The Decision of the Court of Appeals Is in Conflict With the Decision of the Tax Court and is Contrary to Established Rules for Determining Whether Reimbursed Expenses Constitute Income.

The District Court in this case found that the $446 of expenses for which England was reimbursed "were of an

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[21] S. Rep. No. 830, 88th Cong., 2d Sess. 71-72 (1964); H. R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).

extraordinary nature required to be incurred by the employer" (R. 23), that the Company did not intend the reimbursement to be compensatory (R. 20), and that as a result the expenses "were the employer's costs and not the employees" (R. 23). So finding, the District Court held that the reimbursement to England for such expenses did not constitute income.

The District Court discussed at length and agreed with the reasoning and result in *John E. Cavanagh,*[22] where the Tax Court, in a decision reviewed by the entire Court, held that the reimbursement of a transferred employee for the extraordinary costs of food and lodging incurred while he and his family were awaiting arrival of their household effects at his new job location was not includible in income. The Tax Court felt that the fact that ordinary food and lodging costs might be characterized as non-deductible personal living expenses was irrelevant if the reimbursed extraordinary expenses were initially incurred and paid on behalf of the employer. Such characterization, the Tax Court said, "has no applicability to such expenses properly chargeable to another which the taxpayer pays and for which he is reimbursed."[23]

So reasoning, the Tax Court viewed the question of includibility in income of the reimbursed expenses as entirely dependent on the facts of the case. The Court there found "the agreed facts to be that petitioner actually expended $280 in extraordinary living costs"[24] for which he was reimbursed and the further fact that the transfer "was not only for the convenience of his then employer, but specifically directed and required by it."[25] Having thus found that Cavanagh's extraordinary expenses were required to

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[22]36 T. C. 300 (1961), *nonacq.,* 1962-2 C. B. 6.
[23]36 T. C. at 304.
[24]36 T. C. at 302.
[25]36 T. C. at 303.

be incurred by his employer, the Tax Court concluded that their reimbursement did not constitute income to Cavanagh.

The Court of Appeals below disagreed with the factual approach to the issue taken by the District Court below and by the Tax Court in *Cavanagh,* stating that *Cavanagh* "was wrongly decided," that the meals and lodging expenses for which England was reimbursed were "personal living expenses of the employee," and that on their reimbursement "income is realized thereby" (R. 41). The Court of Appeals did not regard the issue before it as requiring application of factual criteria to determine whether the reimbursement constituted income. It paid no attention to and made no inquiry about the findings of fact of the District Court. The Court of Appeals held that an employer's reimbursement of such expenses to a transferred employee constituted income, apparently as a matter of law, even though the reimbursed expenses were found by the District Court to have been extraordinary in nature, to have been incurred only because of a job transfer directed by the Company and not to have been intended by the Company to be compensatory.

The holding of the Court of Appeals is, of course, contrary to *Cavanagh.* More important, it is contrary to the general proposition, recently reaffirmed by this Court in *Rudolph* v. *United States,*[26] that the question of whether an employer's reimbursement of expenses paid by an employee constitutes income is predominantly a question of fact. It is also contrary to the existing ruling precedents in the moving expense area.[27]

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[26]370 U. S. 269 (1962).

[27]The Court of Appeals cited *Cockrell* v. *Commissioner,* 321 F. 2d 504 (8th Cir. 1963), as supporting its view. In *Cockrell,* the transferred employee in 1956 received a special allowance for two months while living with his family in a motel at his new job location. Prior to 1957, the employee and his family moved into a rented house and the employer then paid him a $70 a week living expense allowance. Only 1957 and 1958, involving the $70 a week allowance and not the motel reimbursement, were before the Court, and the case was argued

In Rev. Rul. 54-429,[28] the Internal Revenue Service ruled that gross income does not include amounts received by a transferred employee in reimbursement for household moving expenses and the cost of transporting the employee and his family to the new job location (including meals and lodging en route). The theory of the ruling is that if the move is "primarily for the benefit of the employer," reimbursement of such expenses "is not compensatory in nature."[29] By the same token, reimbursement of other extraordinary expenses that would not have been incurred but for an employer-directed move should not be includible in income if found to be not compensatory in nature.

Such, indeed, was the holding of Rev. Rul. 63-258, 1963-2 C. B. 22, where the Service ruled that special allowances paid by the Government to civilian and military personnel to cover the costs of travel to a "safehaven post" and for subsistence for a period of up to 180 days, following evacuation from Cuba, were not includible in income. The Service reasoned that since the allowances "are solely intended to offset the direct added expenses which would not have been incurred except for the evacuation, it is apparent that such payments were not intended to be compensatory in nature."

In sum, under the rules of *Rudolph, Cavanagh,* and existing ruling precedents in the moving expense area, the Court of Appeals below should have been concerned only with the determination of whether the District Court employed the proper factual criteria and whether the District

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and decided on the question of whether the employee's assignment was temporary or permanent. The *Cockrell* case has no bearing on the reimbursement issue here involved.

[28] 1954-2 C. B. 53.

[29] The ruling also held that "reimbursements for meals and lodgings of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee." It does not appear whether the food and lodging costs dealt with by the ruling were normal or extraordinary costs so far as the employee was concerned.

Court's findings of fact with respect thereto were "clearly erroneous." *Cf. Commissioner* v. *Duberstein*, 363 U. S. 278 (1960). In treating the issue before it as entirely a matter of law, the Court of Appeals below committed error.

Because of the widespread importance of the tax treatment of reimbursed expenses to transferred employees, it is essential that this Court resolve the uncertainties created by the decision below.

III. The Decision of the Court of Appeals Is in Conflict With Decisions of the Courts of Appeals for the Sixth and Ninth Circuits on the Meaning of the Taxpayer's "Home".

After holding that England's $446 reimbursement was includible in his income, the Court of Appeals below also rejected England's right to deduct part or all of the expenses for which he was reimbursed as travel expenses while away from home under section 162(a)(2), holding that a taxpayer's "home" for purposes of that section "is the place of taxpayer's business. In this case Springfield clearly was England's 'home' after the transfer. . . ." (R. 42). This conclusion of the Court of Appeals is in agreement with the interpretation of "home" by the Court of Appeals for the Fourth Circuit.[30] On the other hand, the Courts of Appeals for the Sixth[31] and Ninth Circuits[32] have held that "home" is not synonymous with "business situs" and that a taxpayer's place of business may be "away from home."[33]

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[30] *Bercaw* v. *Commissioner*, 165 F. 2d 521 (4th Cir. 1948); *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945).

[31] *Burns* v. *Gray*, 287 F. 2d 698 (6th Cir. 1961).

[32] *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962); *Wallace* v. *Commissioner*, 144 F. 2d 407 (9th Cir. 1944).

[33] The Court of Appeals for the Fifth Circuit took the same view in *Flowers* v. *Commissioner*, 148 F. 2d 163 (5th Cir. 1945), *rev'd on diff. issue*, 326 U. S. 465 (1946) and *United States* v. *LeBlanc*, 278 F. 2d 571 (5th Cir. 1960). The present position of that Court is not clear, however. See *Light* v. *Commissioner*, 310 F. 2d 716 (5th Cir. 1962).

Twenty years ago the Solicitor General of the United States advised this Court that "resolution of the conflict is of considerable importance" because the question "arises frequently in the collection of income taxes and affects the recovery of substantial amounts of revenue."[34] Although this Court has twice taken cases involving the interpretation of "home" in the Courts below, the Court disposed of both without reaching that question. *Peurifoy* v. *Commissioner,* 358 U. S. 59 (1958); *Commissioner* v. *Flowers,* 326 U. S. 465 (1946). In the meantime, the conflict and confusion among the Courts of Appeal have increased, and the increasing mobility of American labor has made the issue even more prevalent. Only this Court can finally resolve the question of whether "home" as used in section 162(a)(2) necessarily means the taxpayer's business situs.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 1965

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[34] Petition for Writ of Certiorari, pp. 8, 9, *Commissioner* v. *Flowers,* 326 U. S. 465 (1946).

APPENDICES

APPENDIX A

Opinion of The Court of Appeals

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1964—September Session, 1964

No. 14727

Decided, April 29, 1965

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

BEFORE:

CASTLE, KILEY AND SWYGERT,
Circuit Judges

KILEY, Circuit Judge:

This appeal by the Government from a judgment for a refund to plaintiffs[1] of income tax poses the issue whether England, taxpayer, must include in his gross income for

[1]Connie J. England is also a plaintiff in this case since she and her husband filed a joint return for the taxable year in question.

1960 an amount which he was reimbursed by his employer for certain expenses incurred, prior to gaining possession of new permanent quarters, incidental to a transfer to a new post in the employer's interest; or alternatively, whether such amount, if includible in gross income, is a deductible travel or business expense. We think the district court erred in deciding this issue in favor of England.

The facts are undisputed. England was permanently transferred by his employer from Kansas City, Missouri, to Springfield, Illinois, where he arrived on June 19, 1960. He began then to look for a place for his family to live and on July 9, 1960 leased a house which was unavailable for occupancy until August 1, 1960, at which time his family moved in. Pursuant to its policy and regulations, the employer reimbursed England for $466.00 [*sic*] of his Springfield expenses incurred prior to taking possession under the lease. The major items of expense were his meals and lodging and a trip by his wife to inspect a house in Springfield.[2] England did not request or wish to make the transfer but did so at the behest of the employer.

The Commissioner of Internal Revenue added the amount of reimbursement to the taxpayer's gross income and assessed an additional tax of $103.00. England paid the tax under protest, and brought this suit after the Government rejected his demand for a refund.

We agree with the Government, contrary to the district court's view, that in view of § 61(a)'s definition of gross income as "all income from whatever source derived, including (but not limited to) the following items," the fact

[2]Other items included laundry and cleaning expense, boarding of taxpayer's dog and cat, and the cost of a title search, revenue stamps, newspaper advertisement, and telegram in connection with the sale of taxpayer's house in Kansas City.

that the reimbursement received by England might not fall within item (1) "Compensation for services, including fees, commissions, and similar items" is not in any way controlling. Nor is the fact, emphasized by the court, that England suffered a financial loss in the transfer to Springfield controlling as to whether the reimbursement constitutes gross income. We disagree, for reasons which will be clear hereafter, with the court's conclusion that congressional intent was that England's reimbursement should be excludable.

Revenue Ruling 54-429, 1954-2 Cum. Bull. 53, interpreting § 22(a) of the Internal Revenue Code of 1939, predecessor of § 61(a) of the 1954 Code, provides that an amount received as reimbursement by an employee from an employer for the expenses of moving himself, his immediate family, his household goods and personal effects from one official station to another for permanent duty is not includible in the employee's gross income. The Ruling then specifically provides that

> Amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee.

We think that this ruling is a permissible interpretation of the Internal Revenue Code's definition of gross income, and a correct one. The expense of transporting an employee to a new post of duty for benefit of the employer is properly an expense of the employer, not compensation to the employee, but the costs of meals, lodgings, and expenses incidental to securing housing at the post are personal living expenses of the employee, and if they are provided by the

employer, income is realized thereby. This question was resolved adversely to England in *Cockrell* v. *Commissioner*, 321 F.2d 504 (8th Cir. 1963), where the taxpayer received a per diem allowance from the employer at the new post and a special allowance to reimburse him for the cost of living in motels near the new post while attempting to find housing, scarce in the area. The Tax Court and the Eighth Circuit upheld the Commissioner's determination that the allowances were includible in the taxpayer's gross income and that they were not deductible as travel expenses while away from home.

Plaintiffs and the district court relied on *John E. Cavanaugh*, 30 [*sic*] T. C. 300 (1961), in support of the court's decision. The Government contends, and we agree, that that case was wrongly decided in failing to follow Rev. Rul. 54-429 and in excluding reimbursements for "extraordinary" post-arrival food and lodging expenses from gross income.

The district court here held that even if the amounts in question are includible in gross income, they are deductible either as ordinary and necessary business expenses under § 162(a)[3] or as reimbursed travel expenses while away from home in the pursuit of a trade or business, under §§ 62(2)(A)[4] and 162(a)(2).[5] A taxpayer's "home," for

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[3]Int. Rev. Code of 1954, § 162(a). "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

[4]Int. Rev. Code of 1954, § 62(2)(A). "The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer."

[5]Int. Rev. Code of 1954, § 162(a)(2). "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business. . . ."

the purposes of the reimbursed travel expense deduction, is not necessarily the place of his residence. Rather, it is the place of the taxpayer's business. In this case Springfield clearly was England's "home" after the transfer, and expenses incurred there were not "away from home." *Commissioner* v. *Flowers,* 326 U. S. 465 (1946); *Cockrell* v. *Commissioner,* 321 F. 2d 504 (8th Cir. 1963); *Kalist* v. *Commissioner,* 321 F. 2d 508 (8th Cir. 1963); *Light* v. *Commissioner,* 310 F. 2d 717 (5th Cir. 1962); *Andrews* v. *Commissioner,* 179 F. 2d 502 (4th Cir. 1950); *Ney* v. *United States,* 171 F. 2d 449 (8th Cir. 1948); *York* v. *Commissioner,* 160 F. 2d 385 (D. C. Cir. 1947); *Darrell Spear Courtney,* 32 T. C. 334 (1959). No deduction for those amounts is allowable under §§ 62(2)(A) and 162(a)(2).

We think too that the district court's decision that these amounts were deductible as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" under § 162(a) cannot be sustained. The expense of England's meals and lodging, his wife's trip, and the sale of his house were personal expenses, expressly made non-deductible by § 262. *Cockrell* v. *Commissioner; Light* v. *Commissioner; York* v. *Commissioner; Andrews* v. *Commissioner, supra.*

England relies on *Walter H. Mendel,* 41 T. C. 32 (1963), now on appeal before the Fourth Circuit, in support of his position that these expenses are deductible. That case, which the Government contends was wrongly decided, allowed deductions for unreimbursed expenses of transporting household goods and for hotels and meals in transit to the new post, which the Tax Court characterized as business expenses. In view of our decision that the expenses

involved here are personal expenses, *Mendel* is not directly in point and we need not express any opinion as to its correctness.

The judgment is reversed and the cause remanded with instructions to dismiss the complaint.

Appendix A

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Thursday, April 29, 1965

Before

Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 14727

KENNETH D. ENGLAND and
CONNIE J. ENGLAND,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to dismiss the complaint, in accordance with the opinion of this Court filed this day.

APPENDIX B

Opinion of The District Court

UNITED STATES DISTRICT COURT

for the Southern District of Illinois

Civil No. 3220

Decided, February 27, 1964

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Poos, District Judge: This is an action for a refund of federal income taxes for the year 1960 in the amount of $103.00 plus interest, pursuant to Title 28, Section 1346 (a)(1) of the United States Code, and Section 7422 of the Internal Revenue Code of 1954. The Plaintiff taxpayer was permanently transferred by his employer from Kansas City, Missouri to Springfield, Illinois and preceded his family by six weeks, during which time he incurred certain living expenses, being unable to procure permanent living accommodations at an earlier date. These costs were reimbursed by his employer, Aetna Casualty and Surety Company and not reported as income by the taxpayers. The De-

fendant assessed a deficiency which was paid, and a claim for refund filed.

Plaintiffs contend that the reimbursement made to the taxpayer, Kenneth England, was for extraordinary business expenses required and incurred on behalf of his employer and not income, or in the alternate that the expenses in question were deductible as ordinary and necessary business expenses. The Government contends that the reimbursement constitutes taxable income.

The Plaintiff taxpayers, Kenneth D. and Connie J. England, husband and wife, were employed by Aetna Casualty & Surety Company; he, as an assistant chief auditor for a period of seven years, and she, as a clerk in the Kansas City, Missouri office. They had resided there for a period of seven years in a mortgaged home owned by them. The wife's salary was $4,200.00 annually. On May 19, 1960 an opening developed in the Springfield, Illinois office of the Aetna which the husband was qualified to fill. The General Manager of the Kansas City office requested him to transfer to Springfield. This transfer was not solicited by the husband. He had reasons to believe that he was in line to succeed to the chief auditor's position at the Kansas City office, if a vacancy occurred. Neither he nor his wife was desirous of making the change. He was asked to report to Springfield on June 1st, but on his request was allowed some additional time. The husband, in fact, arrived in Springfield on June 19, 1960. At the time of transfer, his salary was increased $750.00, $250.00 of which was a merit raise. No arrangements were made for the wife's re-employment by Aetna. There were various pressures on the husband to accept the transfer, chief of which was that a refusal would have ruined any chance of future advancement and another was

the displacement of family living conditions. There were also pressures on him to decline the transfer, chief of which was the necessity to sell his Kansas City home and to locate a home in which to live at his transferred location.

He made his first trip to Springfield on May 23, 1960 to interview Al Chunis, whom he was succeeding, the General Manager, and the other employees with whom he would be working at the Springfield office. At this time he made inquiries concerning new living quarters. He returned to Kansas City where it was determined that his date for the Springfield assignment was to be July 1, 1960. He next returned to Springfield on June 20, 1960, when he entered on his new duties. At this time he commenced looking for a place to live and on July 9, 1960 signed a lease to commence August 1, 1960. Prior to the execution of the lease, the wife came to Springfield to inspect two houses that were under consideration, and she selected the one at 2835 South Lincoln, which was subsequently leased and to which their furniture was moved from Kansas City. The premises were not available before August 1, 1960, because the owner could not surrender possession earlier.

On June 27 of the same year the husband received a phone call concerning the sale of the Kansas City house from a real estate agent who asked that he take a price slightly below the asking price. He confirmed the lower price by wire. The expense of this wire, among others, is part of the expense claimed in the suit. The husband made trips from Springfield to Kansas City on two weekends to make final arrangements for the sale of his Kansas City home, and for the purpose of bringing personal property to Springfield. He also closed out bank accounts. It was during these two trips that all Kansas City ties were severed.

Appendix B

Between June 19th and August 1st, 1960, the transition period between job locations, he incurred certain expenses totaling $446.00,[1] for which his employer, Aetna, reimbursed him. Aetna, because of the nationwide nature of its business, has a defined program for reimbursement to its employees of expenses incurred in job transfers, and has printed instructions covering these expenses. The company recognizes that employees who are asked to transfer suffer financial loss because of traveling and duplicated living expenses. The employee is required to submit an itemized expense account. The husband taxpayer submitted his expense account to AEtna, and was paid the above amount.

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[1]The itemized expense account for the week of June 19th through June 25th includes the following items: motel room expense, $24.00; reimbursement to friend for use of apartment, $12.00; meals, $30.15; telephone confirming motel reservation, $1.50; total amount, $67.65. For the week of June 26th through July 1st includes $16.00 reimbursement to friend for use of apartment for four days; meals, $18.80; telegram to Kansas City confirming sale of house, $1.38; newspaper ad to rent house, $10.73; dinner and entertainment for departing auditor, A. P. Chunis, $7.00; laundry, $2.60; and cleaning, $0.80; total amount, $57.31. For the week of July 5th through July 9th includes motel room expense, $28.00; meal expense, $23.75; and during the same period for the wife's expense trip from Kansas City to Springfield to inspect the contemplated house for living quarters in Springfield: railroad travel expense, $59.18; taxi fare, $1.25; motel room for two days, $10.00; and meals, $12.65; total amount, $134.83; for the period of July 10th through July 16th includes motel expense, $24.00; meal expense, $21.40; telephone expense, $0.80; laundry, $6.56; and cleaning, $4.40; total amount, $57.16; for the period of July 17th through July 23rd includes motel room expense, $42.00; meal expense, $31.95; cleaning expense, $1.60; total amount, $75.55 and for the period of July 24th through August 1, includes motel room, $20.50; meal expense, $24.80; board of dog and cat, $3.50; bring title to date, $50,00; revenue stamp, $3.30; total amount, $102.10. The totals for the entire period amounted to $494.60 from which the Aetna disallowed $41.77 as excessive under its rules, leaving an allowable expense claim of $452.83, but the parties have agreed upon $446.00 for the purposes of this action.

This allowance is limited to $50.00 for a seven-day week. The taxpayers, at the time of filing their 1960 tax return, did not include this allowance as income. The taxpayer spent more than the $446.00 reimbursed them in making this move at AEtna's request and direction. Taxpayer's overall financial condition was not improved by virtue of this $446.00 payment. This move was, in a number of ways, an expensive one for the taxpayers. They had to sell their Kansas City house on which they were repaying a mortgage at a cost to them of $835.00 for real estate selling commissions. They had to pay July interest amounting to $51.38 covering the period of the move from Kansas City, Missouri to Springfield, Illinois; they had to pay one-seventh of the State and County Taxes for the month of July amounting to $13.25; they had to pay one-seventh of the city and park taxes for the month of July amounting to $3.26. Revenue stamps on the deed of conveyance of their property amounted to $3.50, and they paid a title policy fee of $77.85. All of these unreimbursed expenses were occasioned by the move. In addition, the wife had a salary loss of $775.00, and the laundry could no longer be done as in Kansas City by the wife's mother at no cost. Thus, this move was an expensive one to taxpayers, without reimbursement for some of the items.

The Director of Internal Revenue, on audit of taxpayers' return, added the reimbursed expenses of $446.00 to gross income, and assessed an additional tax amount to $103.00.[2] This amount was paid under protest, a claim for refund was filed, and was denied by the Government.

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[2]The above sum of $446.00 was held to be reportable as addition to gross income by the District Director in the following interpretation of the rulings and the statute:

> "Mr. England, an employee of the AEtna Casualty Company, was transferred by this employer from Kansas City,

Appendix B

The following provisions of the Internal Revenue Code are pertinent to the decision of this case:

"Sec. 61. Gross Income defined:

(a) General definition: Except as provided in this subtitled, gross income means all income from whatever source derived including (but not limited to) the following items:

(1) Compensation for personal service, including fees, commissions and similar items.

Sec. 62. Adjusted gross income defined:

For the purpose of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

Missouri, to Springfield, Illinois. The cost of moving his household goods was paid by the employer, and travel expenses of Mr. England and his family were either paid by the employer directly or reimbursed to Mr. England.

In addition to the travel and moving expense, the employer reimbursed Mr. England for certain living expenses while he was in Springfield, and his family was still in Kansas City. Such reimbursements, mostly for a motel, room and meals, totalled $446.00. . . .

2(b) Reimbursements for living expenses.

The facts regarding this issue are included in Item 2(a) above.

Revenue Ruling 54-429, supra, also provides 'amounts received as allowances or reimbursements for meals and lodging of the employee and his family while waiting permanent quarters at the new post of duty are includible in gross income of the employee'.

Therefore, it is held that the reimbursements of living expenses in the total amount of $446.00 as represents income to Mr. England, taxable under Section 61 of the 1954 Internal Revenue Code. It is further held that no part of the $446.00 may be deducted by the taxpayer under authority of Section 262 of the 1964 Internal Revenue Code."

Appendix B

(2) Trade and business deductions of employees.

(a) Reimbursed expenses: The deductions allowed by Part VI (sections 161 and following) which consist of expenses paid or incurred by the taxpayer in connection with the performance by him of services by an employee, under a reimbursement or other expense allowance with his employer.

(b) Expenses for travel away from home: The deductions allowed by Part VI (Sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(c) Transportation expenses: The deductions allowed by Part IV (Sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee . . ."

Sec. 63. Taxable income defined.

(a) General rule. Except as provided in subsection (b) for the purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter, other than the standard deductions allowed by Part IV (Sec. 141 and following).

(b) Not applicable.

Sec. 161. Allowance of deductions. In computing taxable income under Sec. 63 (a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (Sec. 261 and the following) relating to items not deductible.

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Sec. 162. Trade or business expenses.

(a) In general. There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including:

(1) A reasonable allowance for salaries or other compensation for personal services actually rendered.

(2) Travelling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business.

Sec. 211. Allowance of deductions.

In computing taxable income under Sec. 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (Sec. 261 and following, relating to items not deductible.)

Sec. 261. General rule for disallowance of deductions.

In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part.

Sec. 262. Personal, living and family expenses.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal living, or family expenses.

The inquiry is twofold: First, was this payment an addition to gross income under Sec. 61, and, secondly, if so, could it be deducted in view of the injunction of Sec. 262

which forbids a deduction for "personal, living, or family expenses"?

Under Section 61, gross income is defined as "all income from whatever source derived, including (but not limited to) the following items:

> (a) Compensation for services, including fees, commissions and similar items."

The Government, in its argument, says "that it should be clear that the amounts involved herein represent gross income within the meaning of Sec. 61 of the Internal Revenue Code of 1954." It argues that gross income means all income from whatever source derived, and includes all kinds of compensation for services and further argues that this is an instance of undeniable accession to wealth clearly realized, and over which these taxpayers have complete dominion. These statements, while true in a general way, cannot be applied to the facts adduced by the evidence to include this reimbursement in the taxpayers' gross income under Sec. 61. This record shows that rather than an increase in wealth, the taxpayers in fact saw their financial situation worsened in carrying out the direct request of the husband's employer to make the move from Kansas City to Springfield. It is clear that financially they are worse off for having made the transfer than had they remained in the employ of Ætna in Kansas City, in so far as their immediate fortune is concerned. This payment cannot be considered income earned from an actual personal service. The evidence shows a detriment to wealth. Section 61 says that gross income means all income from whatever source derived including, but not limited to compensation for services, including fees, commissions and similar items. Nowhere

does Sec. 61 say that reimbursed extraordinary expenses directly related to a taxpayer's job, occurring by reason of a directed move by a superior to take another job in a different office of a vast enterprise, are income. In this temporary period of relocation, this money was not paid by way of reimbursement for services actually rendered. The employer's rules definitely state that these payments are made only because employees otherwise suffer a financial loss because of traveling and duplicated living expenses arising from a transfer. They limit an employee's reimbursement to his actual expenses which are not, however, to exceed $50.00 weekly.[3] The evidence here shows that, in fact, the amounts expended for the items involved in the reimbursement was actually greater than the allowance, without even taking into consideration the $835.00 paid by the taxpayers for real estate sales commissions and the other items they paid such as taxes and interest noted above, all of which decreased their accumulated wealth. The taxpayers' net worth for the taxable year 1960 shows an actual reduction rather than an accession to wealth as claimed by the Defendant.

It is clear that the intention of the statutes, when the Internal Revenue Code is read as a whole, would exclude the items here in dispute from gross income. The interpretation of the statute argued for by the Government, would have the effect of placing a tax on the plaintiffs for what was in fact an actual loss to them.

The result reached in the case of *John E. Cavanagh* 36 T. C. 300, (5/18/61), which involved an analogous fact situation, is equally applicable here. The Government there

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[3]Employer's instructions are contained in the Appendix to this Opinion.

claimed that a tax was due it for failure on the part of a taxpayer to include $280.00 as living expenses for two weeks for which he was reimbursed by his employer. The $280.00 was held by the Tax Court to be non-compensatory and thus not includible in gross income under Sec. 61. The Court said the expenses were not *normal* expenses of the employee within the meaning of Sec. 262 but that these expenses were *extraordinary* living expenses attributable to the employer's having transferred him. The Court said:

> "There is no provision of the Internal Revenue Code of 1954 specifically requiring the inclusion in gross income of such payments as those here involved nor is there any provision specifically providing for the exclusion or deduction thereof. There is, however, a ruling by respondent with respect to the exclusion from gross income of transportation expenses paid by an employer to or in behalf of an employee where such transportation is required for the convenience of the employer, *Revenue Ruling* 54-429, C. B. 1954-2, 53, wherein respondent has ruled, in part, as follows:
>
> "Accordingly, it is concluded that (1) amounts received by an employee from his employer representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer, from one official station to another for permanent duty, do not represent compensation within the meaning of Section 22(a) of the Code, and are not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expanded for such purposes * * *.

Appendix B

"With the exception hereinafter discussed, we think the above ruling is sound and has persuasive effect here."

"With respect to the $280.00 reimbursement to petitioner of his excess cost for the food and lodging of his family while his household effects were in transit, the following language from the above-cited ruling is claimed by respondent to prevent the exclusion thereof from income:

"Amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee. (Rev. Ruling 54-429, supra, 54.)

"We agree that to the extent such reimbursements defray the ordinary and necessary food and lodging costs of an employee they represent payment of an *employee's* living expense and are income to him, but to the extent such reimbursements defray only reasonable and necessary extraordinary food and lodging expense required to be incurred by the employer, they represent repayment to the employee of an amount he has first paid for and in behalf of his employer and do not constitute income to him. They are the employer's costs, not the employee's. To the extent the above ruling would require the inclusion in income of reimbursement for such extraordinary *food and lodging* costs, it is not a correct interpretation of Section 22(a) or Section 24(a) of the 1939 Code or Sections 61(a) and 262 of the 1954 Code. The prohibition against the deduction of personal living expenses has reference only to such

expenses as are ultimately chargeable to the taxpayer. It has no applicability to such expenses properly chargeable to another which the taxpayer pays and for which he is reimbursed."

Likewise, in the instant case, the expenses here in question were of an extraordinary nature required to be incurred by the employer and repaid by it. Such expenses were the employer's costs and not the employees.

The tax Court has recently cited its decision in the *Cavanagh* case with approval. *Walter H. Mendel,* 41 T. C. No. 4, (October 10, 1963).

If it is conceded (and the Court finds to the contrary) that this reimbursement should be included in gross income under Section 61, the Government then argues that no deduction can be taken for these reimbursed expenses because of the provisions of Section 262. This section provides that, except as otherwise provided, no deduction shall be allowed for "personal, living, or family expenses." In our view of the evidence, these expenses, which were reimbursed to the taxpayers to prevent them from sustaining further economic loss because of the duplication of living expenses during the transition period, were not non-deductible "personal, living, or family expenses." The facts before the Court show that these moving expenses were incurred while the husband was away from home in the pursuit of his trade or business and were incurred in connection therewith.

The disallowance of Section 262 is not in all events and such expenses are allowable if otherwise provided for. In our view, such an allowance is provided by Section 62(a)(A).[3] This section permits employees a deduction from

[3]Section 62(2)(B) which might otherwise be applicable does not apply here since that section does not apply to reimbursed expenses.

gross income of certain reimbursed amounts if these amounts (1) are allowable under Part VI (Sections 161-182) of subchapter B of the Internal Revenue Code (2) were paid in connection with the taxpayer's performance of services as an employee, and (3) were paid under a reimbursement or other expenses allowance with his employer. We think that the facts found here show that all three of these tests are met. There is no question that those items were reimbursed by the husband's employer under a reimbursement arrangement with his employer. Since these reimbursed expenses arose out of the transfer of the husband from one office of his employer to another, the necessary connection with the performance of services is present. Finally, we hold that these expenses would be deductible under Section 162(a) as an ordinary and necessary expense in carrying on the husband's trade or business of performing services for Ætna as an employee. While we would characterize these expenses as traveling expenses within the meaning of Section 162(a)(2), if that characterization is incorrect, we feel that these expenses would still be ordinary and necessary under the broad allowance of Section 162(a). The requirements of Section 72(2)(A) are thus satisfied such that Section 262 has no application to the facts of this case.

That these expenses are of a kind which may be deducted under Sec. 162(a) is clearly indicated by the case of *Walter M. Mendel,* op. cit., which allowed a deduction for the unreimbursed portion of certain moving expenses. Although the items of expense involved in that case differ from those in the present case, the Tax Court clearly indicated that all expenses incidental to a taxpayer's move made at the request of and for the benefit of his employer are deductible if necessary to accomplish the move. Likewise, in this case

a fair construction of the facts show that the transfer of the taxpayers was at the request of and for the benefit of the employer, who needed a replacement for auditor Chunis who for personal reasons had requested an immediate transfer to Boston, and the transfer was accepted by Plaintiff, Kenneth D. England, for the benefit of his employer rather than himself. It was contended in that case that the expense of moving the taxpayer's wife and household effects were personal expenses and not business expenses. The Court reaffirmed the *Cavanagh* case, supra, and said:

> "If amounts expended by a taxpayer in moving from one permanent post of duty to another are not personal expenses, they are for the purpose of the taxpayer's business as an employee since the cause of the move is business requirements. Ordinary and necessary business expenses are deductible by an employee who itemizes his deductions on his income tax return. . ."
>
> "The clear inference from our holding in *John E. Cavanagh,* supra, is that the entire amount of the expenses paid by an employee in moving from one permanent duty station to another is deductible to the extent that the amount expended is ordinary and necessary to accomplish the move and that this may be accomplished either by not including the reimbursed amount in income or by including the reimbursed amount in income and deducting the total amount expended. In the instant case, it appears from the record that petitioner has not included the $316, which he received from the Veterans Administration as reimbursement for his moving expenses in his 1957 income as reported."

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Accordingly, the facts as above set out are found to be the facts in this case, and the law as hereinabove set out are the conclusions of law, and accordingly are hereby adopted as the findings of fact and conclusions of law, and under them judgment is ordered for the plaintiff in the full amount as prayed with interest, and the final judgment figures to be entered are to be determined by the parties hereto.

Appendix B

Appendix to Opinion of the District Court

INSTRUCTIONS OF
AETNA CASUALTY AND SURETY COMPANY
TO
EMPLOYEES MOVED AT COMPANY'S EXPENSE

It is the company's intent that employees, who are asked to transfer, not suffer a financial loss because of traveling and duplicated living expenses. Correspondingly, it is expected that any such employee will give full consideration to the company's interests and arrange his affairs so as to keep expenses incurred by a transfer to a reasonable minimum.

The following instructions, contained in paragraphs 1 through 6, apply only to married men, or single men who are the head of a household:

1. It is expected that a transferred employee, when reporting to the new location, will not bring his family with him unless prior permanent or semi-permanent (not hotel) accommodations have been arranged.

2. He may spend not more than one week at a hotel after which time it is expected that he will rent a room on a reasonable weekly basis.

3. After not more than one week at a hotel and until he brings his family to the new location, he will be allowed to submit expense accounts for out-of-pocket expense not to exceed $50 per seven day week. This is not a flat allowance and it must be itemized. This allowance includes room, meals, laundry, etc. Also, if there is a weekly trip home (par. B9A) the cost must be included under the $50. allowance. This allowance will not be continued beyond 90 days

from the date of reporting to the new location without prior approval of the H.O. Department which arranged the transfer.

4. If he owns his home in the old location, he should arrange to place it on the market for sale. It will probably not be possible for him to move his family to the new location until his home in the old location has been sold. However, he should begin looking over the housing situation in the new location so that when his home in the old location is sold he will have a fairly good knowledge of conditions in the new location.

5. After he has investigated the housing market in the new location, he probably will want his wife to come for a few days to look at specific properties and the cost of this will be at company expense. It is expected that she would not have to make more than one trip to the new location before moving. In any event, only one inspection trip will be reimbursable under this program.

6. Since he owns his home in the old location, he may want to buy again in his new location. Or, if suitable rental accommodations can be found, he may prefer to rent for a while before buying. In any event, expense reimbursement will cease as soon as he moves his family to permanent quarters in the new location, or within 90 days, whichever first occurs. It may be necessary to have his family stay at a hotel for a day or two after arrival in the new location; but this should be kept to a minimum.

NOTE: In the event the transferee does *not* own his home the following instructions supersede paragraphs 4, 5, and 6.

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As soon as possible after arrival in the new location he should begin looking for a place to live. After he has investigated the housing situation he will probably want his wife to come to the new location to look at specific properties, and the cost of this will be at company expense. It is expected that she would not have to make more than one trip to the new location before moving. In any event only one inspection trip will be reimbursable under this program.

Expense reimbursement will cease as soon as he moves his family to permanent quarters in the new location. It may be necessary to have his family stay at a hotel for a day or two after arrival in the new location, but this should be kept to a minimum.

7. In the case of a single man, not head of a household, living costs at the new location will be paid for a period not to exceed one week during which period the employee is expected to make permanent housing arrangements, after which expense reimbursement will cease.

8. The company will reimburse employees for transportation costs incurred for transfer from one location to another as follows:

A. If public transportation is necessary, reimbursement will include charges for fares on plane, train or bus, for the most direct route. Reasonable expenses customarily associated with travel, such as meals enroute, tips, cabs or limousines will also be reimbursed.

B. If an employee uses his own car as the means of transportation the company will permit mileage allowance at the rate currently in force for the most direct route. In

addition, reasonable expenses enroute such as hotels, parking, tolls, meals and tips will be reimbursed.

C. Unless instructed to do otherwise employees who have a company leased car assigned to them should use this car as a means of transportation when transferred. Expense reimbursement will be in the same manner as any other trip made for business purposes. Miles driven beyond the most direct route will be considered as personal miles.

D. If a transferred employee has more than one car in his family and they are owned by him or his family, the company will permit mileage allowance at the rate currently in force for the most direct route for all cars. Employees in this category should make use of the cars so as to avoid any necessity of using other means of transportation for moving the family to the new location.

9. It is the company's desire when men are being transferred to disturb the family relationship as little as possible. Accordingly, married men and single men who are the head of a household may be permitted to return home for week-ends prior to moving their families to the new location subject to the following conditions:

A. In some cases distances will be relatively short between the new location and the old location. If the cost of transportation home each week-end is equal to or less than the cost of maintaining the transferee over the week-end at the new location he should normally return to his home each week-end. Factors involving leaving time on Fridays and arrival time on Mondays should be considered.

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B. In cases not covered under 9A the transferee will be permitted to return home at company expense every three weeks, provided the distance involved is reasonable enough to justify this frequency.

10. An employee will be reimbursed for transportation costs of moving his immediate family to the new location on the same basis as for himself. For the purpose of defining immediate family, it shall include members of the household of his principal residence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONERS

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Printed by Byron S. Adams, Washington, D. C.

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BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 42 of the Supreme Court of the United States, the Electronic Industries Association respectfully files this brief *amicus curiae* in support of the Petition for a Writ of Certiorari filed in behalf of Kenneth D. England and Connie J. England in the instant case. Both counsel for Petitioners, Kenneth D. England and Connie J. England and counsel for the Respondent, the United States of America have given their consent to the filing of this brief.

QUESTIONS

Whether an employee who is transferred to a new job location by and at the direction of his employer must include in gross income amounts received from his employer in reimbursement for extraordinary moving expenses necessarily incurred by the employee solely as a result of his job transfer. Alternatively, if the employee must include such reimbursed expenses in gross income, whether the employee is entitled to deduct such expenses as ordinary and necessary business expenses.

INTEREST OF AMICUS CURIAE

The Electronic Industries Association (hereinafter referred to as EIA) is a major trade association, headquartered at 1721 DeSales St., N.W., in the District of Columbia. It represents nearly 300 domestic electronic manufacturers. It is the national association representing the fifth largest manufacturing industry in the United States, with gross annual sales in excess of $15 billion. The manufacturers in this industry alone employ over 875,000 people. In the calendar year 1964 17,500 of these employees were transferred by their employer from one domestic manufacturing facility to another. This represents 2% of the employees in this industry and an increasing trend in the electronics field.

There have been few cases presented to this Court concerning income taxation which have been of importance to so many individual taxpayers, as well as to many corporations large and small.

ARGUMENT

The EIA has read the decision of the United States Court of Appeals for the Seventh Circuit in this case and agrees with the petitioners that a writ of certiorari should be granted.

The Internal Revenue Service makes an illogical distinction between certain of an employee's moving expenses, i.e., travel and transportation on the one hand, and other expenses directly related to the move on the other. There is no basis in fact or law for this distinction. The many types of expenditures involved in employee moves should be treated similarly for tax purposes to the extent that they are reasonable.

CONCLUSION

It is respectfully submitted that (1) to bring a needed consistency to the tax treatment of moving expenses and (2) to aviod clogging of Federal Court calendars with a spate of litigation, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF AMICUS CURIAE OF ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

In Support of the Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

Whether an employee who is transferred to a new job location by and at the direction of his employer

must include in gross income amounts received from his employer in reimbursement for extraordinary moving expenses necessarily incurred by the employee solely as a result of his job transfer. Alternatively, if the employee must include such reimbursed expenses in gross income, whether the employee is entitled to deduct such expenses as ordinary and necessary business expenses.

INTEREST OF THE AMICUS CURIAE

This brief is filed pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States. Both counsel for petitioner and counsel for respondent have stated that the respective parties consent to the filing of this brief.

Associated Industries of New York State, Inc. has since its founding in 1914 served as the "voice of industry" in the nation's largest industrial state. The Association has approximately 1,400 member companies having offices and plants in every part of the State of New York. Both manufacturing and non-manufacturing companies, representing total business activity of many billions of dollars annually, are included within the membership.

A substantial number of the members of the Association conglomerately expend several million dollars yearly in moving transferred employees from one business location to another in the State of New York and around the country. Many thousand employees are involved in these moves. Most of these transferred employees receive reimbursements from their employers for at least some of the necessary out-of-pocket expenses connected with their moves. In most cases,

the Internal Revenue Service can be expected to claim that some part of these reimbursed amounts are taxable income to such employees if the opinion of the Court of Appeals for the Seventh Circuit in this case is allowed to stand. The taxation of reimbursements which merely repay the employee for expenses incurred in a move directed by and for the benefit of the employer imposes an unfair financial burden on the employee, which in many cases may have to be "picked up" by the employer through additional reimbursements to make the employee whole. In the alternative, many employees will no doubt be reluctant to accept a transfer for the employer's benefit if something is not done to relieve this burden. Accordingly, the present confusion in the case law regarding the tax status of reimbursed moving expenses directly and adversely affects both the members of the Association and their employees' morale and pocketbook.

The Association is filing this brief to emphasize to the Court the extremely important nature of this case and the effect it will have not only upon members of the Association and their employees, but to employers all over the country and to the many thousnd employees who are annually transferred to new job locations at the direction of and for the benefit of their employers.

ARGUMENT

This is a very important case to American industry and to the estimated 150,000 employees transferred annually from one city to another by their employers. The case is also of great relevance to the approximately 340,000 military personnel who are transferred annually and may soon be of great significance to civilian government employees as well.

Employers are faced with two problems—first, they find that when an employee is threatened with a tax on some portion of the reimbursed expense which he would not otherwise incur, he naturally becomes more resistant to changing his place of employment. This tends to reduce the ability of employers with multiple plant or office locations to move their employees about the country to best serve the needs of the business. Moreover, the employer will have a serious morale problem with employees who are moved if the employees find they have to pay taxes on reimbursed moving expenses incurred in a transfer made for the convenience of the employer.

Second, the employer who knows that the transferred employee will have to pay taxes on the amounts reimbursed may well feel obligated to reimburse the employee with something extra in an attempt to offset at least part of the additional tax liability. This procedure, if followed, will substantially increase the cost of moving transferred employees to employers.

Conversely, the employee suffers unjustly when he is forced to pay a tax upon reimbursement of expenses incurred on behalf of and at the request of his employer.

As pointed out by the petitioner, more than 150,000 private industry employees were transferred within the United States by their employers in 1964 and the number is likely to steadily increase.

In addition, over 340,000 servicemen will receive over $40,000,000 in 1965 in dislocation allowances. This money is received by servicemen in connection with moves required by the military services. The Internal Revenue Service has ruled, in Rev. Rul. 64-153, 1964-1 C.B. 70, that these dislocation allowances which are in-

tended to reimburse the servicemen for "such extra costs as lease forfeitures, temporary living charges in hotels and boarding houses pending establishment of a normal household, . . ." (the latter expense is the same as the largest part of the expense reimbursed in the *England* case) are includable in the gross incomes of the recipients. The military services have lodged a strong protest with the Internal Revenue Service in regard to this ruling (a copy of a letter from Norman S. Paul, Assistant Secretary of Defense (Manpower), to the Acting Cammissioner of Internal Revenue, is enclosed as Exhibit A).

It is thus quite obvious that a decision by the Supreme Court in this case will have a widespread effect throughout the country, both on private and government employees.

The effect of a decision by the Court in this case will, however, have even more far reaching effect than that which is suggested by the figures quoted above. As noted below, thousands of federal civilian employees who will be transferred to new job locations annually in the interest of the government also have a direct, although at the moment potential, interest in the outcome of this case.

There is presently pending in Congress (before the House Committee on Government Operations) proposed legislation (H.R. 10607) which would authorize reimbursement by the government of certain moving expenses of federal civilian employees which are quite similar to those involved in the instant case. H.R. 10607, 89th Cong., 1st Sess. (A copy of this bill is attached as Exhibit B.)

On September 13, 1965, Senator Tydings introduced into the Senate the equivalent of H.R. 10607. The

bill (S. 2516) was referred to the Committee on Government Operations. The Senator referred to the belief of the Civil Service Chairman, Mr. Macy, that the losses incurred by government employees in moving for the convenience of the government was "the most important single factor in the reluctance of government employees to move". Senator Tydings added emphatically that this factor must be eliminated. Congressional Record, 89th Cong., 1st Sess. pp. 22621-22622. If the Seventh Circuit decision is allowed to stand, this factor, however, cannot ever be wholly eliminated.

The moving expense bill would increase the now scanty reimbursements which the government provides for the employees which it moves about the country. Among other things, transferred government employees would be reimbursed for making one round trip (with spouse) to seek permanent resident quarters at a new official station, would be reimbursed for subsistence expenses for a certain limited period while occupying temporary quarters at the new official station, would be reimbursed for expenses incurred in selling an old house and acquiring a new one (other than loss on sale). These reimbursed expenses are of the same character as many of the reimbursed items upon which the taxpayers in the instant case have been required to pay a tax by the Court of Appeals for the Seventh Circuit.

H.R. 10607 has the active support of the Administration. The Honorable John W. Macy, Chairman of the Civil Service Commission, testified before the Executive and Legislative Reorganization Subcommittee of the Committee on Government Operations of the House of Representatives on September 1, 1965, in favor of H.R. 10607. He introduced into the record

the President's pay message delivered to Congress on May 12, 1965 (a copy of this message is attached as Exhibit C) in which the President urged that legislation be enacted to "establish a coordinated and equitable system for payment of moving expenses to employees transferred for the convenience and benefit of the government."

On May 20, 1965, the Civil Service Commission, in accordance with the President's pay message, submitted the proposed legislation which (with minor changes) is now H.R. 10607 and S. 2516 to the Speaker of the House and to the Vice President as presiding officer of the Senate. In its identical letters of transmittal to Speaker McCormick and Vice President Humphrey, the Civil Service Commission stated that the proposed legislation was designed to correct presently existing inequities which result upon the transfer of government employees. (A copy of the letter sent to the Speaker is attached as Exhibit D.) Since the transfers are made primarily for the benefit and at the request of the government, it was indicated that the government should bear the brunt of the expenses involved. The present arrangement, under which most employees lose substantial amounts of money when forced to change the location of a government job, has proven to be a deterrent to relocation. Agencies are forced to use less satisfactory personnel in many cases than would be necessary if employees were reimbursed for expenses incurred as the result of a transfer. Chairman Macy, writing for the Commission, concluded that "this is poor economy in the short run and is even poorer economy in the long run, for a reasonable degree of geographic mobility is an essential element in a sound career service."

It is quite clear that under the *England* decision, the purpose of the legislation proposed by the Civil Service Commission will be frustrated in large part as there is no reasonable basis for a belief that the Internal Revenue Service can treat government employees differently from employees in private industry. This is especially true in light of Rev. Rul. 64-153 which requires military personnel to include certain reimbursed moving expenses in gross income. The following exchanges which took place between Congressmen Erlenborn and Holifield and Chairman Macy at the very recent hearings (September 1, 1965) on H.R. 10607 conclusively demonstrate the importance the *England* case will have to untold thousands of government employees assuming the enactment of H.R. 10607. (Stenographic transcript of Hearing, pp. 15-18 —not yet formally published.) *

> "Mr. Erlenborn. If legislation such as this [H.R. 10607] were to pass, what would our expectations be as to the taxability to the employee of the amounts that are allowed to him?
>
> Mr. Macy. This is an issue that is before the Commissioner of Internal Revenue. I think a comment on that is beyond my competence to make. My own view would be that these are reimbursements of expenses necessary in the line of work and I don't believe they should be taxable as extra income.
>
> Mr. Erlenborn. If they were taxable, then the employee still would not be fully reimbursed?
>
> Mr. Macy. Correct. The basic objective of the legislation would be partially lost if it were necessary to pay taxes on the reimbursement.

* * * * *

* Printed Hearings, pages 48 and 49.

Mr. Holifield. [Under the bill, the moves are] for the benefit of the government and not primarily for the benefit of the employee.

Mr. Macy. That is the key phrase in this, for the convenience or the benefit of the government. And I have tried to explain to those I have talked to on this legislation that this is not a fringe benefit. This is a reimbursement of costs which the employee must make in order to carry out the instructions of his government, his employer.

Mr. Holifield. I think Mr. Erlenborn brought up a very important point because if a man is going to receive $2,000, for instance, for moving and have to pay 30 percent of that or 25 percent of that back in income tax, why it certainly is not doing what you expect the legislation to do.

Mr. Macy. Exactly, and I feel that the basic philosophy behind this legislation would indicate that this is not compensation, this is not additional income. This is reimbursement, and therefore should not be taxable."

Chairman Macy estimated at the hearings that the government transfers in excess of 35,000 employees annually and that 83% of these people lose money by reason of the move. H.R. 10607 is designed to reduce this loss substantially but such effort will be frustrated to a substantial degree if the *England* case is not reversed.

The effect of the *England* case reaches far beyond the taxpayers involved who are in effect engaged in a class suit on behalf of employees generally. The present impact of the case is that it affects over 150,000 employees in private industry who are transferred annually (including an estimated 450,000 employees whose tax returns are open for years 1962, 1963, and 1964)

and 340,000 military personnel transferred annually (including an estimated 800,000 or 900,000 servicemen whose tax returns are open for years 1962, 1963, and 1964). In addition, an estimated 35,000 government civilian employees yearly will have a direct interest in the case if H.R. 10607 is enacted as seems likely. Although the tax principles involved in the case are not terribly complicated, the result of the *England* case will have far reaching importance and as such it is fitting and proper that the matter be definitively passed on by the Supreme Court.

The Congress of the United States would seem to be in full agreement with this view. The House Ways & Means Committee, in its report accompanying the Revenue Act of 1964, stated in regard to section 217 (allowing a new employee or a nonreimbursed old employee to deduct certain moving expenses):

> "Your committee's bill limits the categories of expense for which a deduction is available to new employees or those who are not reimbursed for moving expenses, to the three categories specified above, which, by ruling, the Internal Revenue Service recognizes as excludable for existing employees. No inference should be drawn from this, however, that moving expense exclusions under existing law are necessarily limited to these three categories of expenses. However, since by administrative ruling, these categories are clearly excludable in the case of existing employees who are reimbursed, your committee believed that deductions for such expenses should also be made available to new employees and nonreimbursed employees as well. *The question of whether the exclusion for existing employees extends beyond these three categories is left for judicial interpretation.*" [Emphasis supplied.] House Report

No. 749, p. 59. Almost identical language appears in Senate Report No. 830, p. 71.

It is clear from the above statement and from the hearings on H.R. 10607 that Congress is hopeful that the courts will decide once and for all whether reimbursed moving expenses give rise to taxable income.

CONCLUSION

It is respectfully submitted that the issues presented in the instant petition for writ of certiorari involve substantial statutory questions. This amicus curiae, therefore, urges the Court to grant a writ of certiorari herein.

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EXHIBIT A

August 6, 1964

Mr. Bertrand M. Harding
Acting Commissioner of Internal Revenue
Internal Revenue Building
12th & Constitution Avenue, N.W.
Washington, D. C. 20224

Dear Mr. Harding:

A recent Internal Revenue Ruling, 64-153, I.R.S.-21, 9 is so potentially harmful to the welfare of our personnel and to the maintenance of an adequate number of career servicemen that we must respectfully request that you reconsider this Ruling. Consistent with the long established Department of Defense policy that tax benefits for servicemen be sought only when the equities and special circumstances of their calling justify them, we have carefully considered the advisability of seeking a reconsideration of your holding.

Only after our research clearly demonstrated that acquiescence in this Ruling would impose an unforeseen and unwarranted tax burden on the career serviceman and his dependents did we decide to submit this analysis of Rev. Rul. 64-153.

This Ruling concludes that dislocation allowances authorized in section 407 of title 37, United States Code, are includible in gross income, evidently without deduction of dislocation expenses, since they are made

> "to cover costs which are merely related to, but not a part of, moving expenses incurred in transporting a member's dependents, household goods, and personal effects to a new duty station and are in addition to allowances designed to defray moving expenses."

Implicit in such an analysis is the recognition that if dislocation expenses are moving expenses they are ex-

cludable from gross income to the extent expended on the move. Rev. Rul. 54-429, C.B. 1954-2, 53.

We note that the House of Representatives Report on the dislocation allowance provision referred to the expenses covered by these allowances as "moving expenses" and we are unable to agree with the conclusion of your Ruling.[1] No subsequent change in congressional intent after enactment of the dislocation allowance provision has been found and, therefore, we feel Rev. Rul. 64-153 is contrary to the clearly expressed intention of Congress.[2] No congressional enactment since 1955[3] is particularly relevant to this inquiry except the Revenue Act of 1964. Significantly the Treasury Department in its submission of proposals for this Act sought to preclude any possibility of adverse tax consequences to military personnel by stating:

> "A special rule would be provided to permit members of the uniformed services to exclude reimbursed moving expenses from gross income. This rule would be in recognition of the fact that members of the uniformed services move very frequently, have little or no control over such moves, and are carefully limited as to the amount of the reimbursements they receive."

Hearings on the President's 1963 Tax Message, 97 (Ways & Means Comm.), 88th Cong., 1st Sess. (1963)

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[1] H.R. Rep. No. 90, 84th Cong., 1st Sess. 11 (1955), on H.R. 4720, enacted as the Career Incentive Act of 1955 which first authorized the dislocation allowance. Section 253(c) of title 37, U.S. Code, referred to in Rev. Rul. 64-153 was codified by Public Law 87-649, September 7, 1962, as section 407 of title 37.

[2] The intent of Congress can govern on tax matters even though it is expressed in other than title 26 of the United States Code, see, *e.g.*, 38 U.S.C. 3101(a). This binding intent is most often found in the legislative history of congressional enactments. See, *e.g.*, Rev. Rul. 63-258, C.B. 1963-2, 22.

[3] See Note 1 *supra*.

In enacting the 1964 Revenue Act, the Congress refused to limit the exclusion of reimbursements for moving expenses of *existing employees*[4] to the two specified categories of expenses deductible by new employees or unreimbursed existing employees. H. R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).[5] Therefore, "no inference should be drawn from" the legislative history of the 1964 Act that dislocation expenses, partially reimbursed by a dislocation allowance are not moving expenses, especially where Congress has declared them to be such.[6] See *ibid.*

Rev. Rul. 64-153 is thus demonstrably without justification in the legislative history of the 1964 Act relating to moving expenses. The Ruling is also at odds with the intent of Congress to ease the tax treatment of moving expenses and the earlier statement of Congress that dislocation expenses are "moving expenses."[7] Even more perplexing is the variance of the Ruling from the declaration by the Treasury that military reimbursements for the moves of its servicemen are not in the nature of gross income.

Moreover, no mention is made of the basic question on which the tax status of military allowances turns: Did Congress intend the allowance to be compensatory and, therefore, income, or noncompensatory and, therefore, not income? The Internal Revenue Service has recognized that the intent of Congress in authorizing an allowance is of paramount concern in determining whether it is includible in a serviceman's gross income. Rev. Rul. 63-258,

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[4] The dislocation allowance is not paid to persons ordered from their homes to their first duty stations. 37 U.S.C. 407.

[5] The Senate adopted the House's policy on this matter. S. Rep. No. 830, 88th Cong., 2d Sess. 71-72, p. 219 (pt. 2) (1964).

[6] Note 1 *supra.*

[7] *Ibid.*

C.B. 1963-2, 22. Your office has also recognized that payments to or in behalf of a serviceman or his dependents which "are solely intended to offset the direct added expenses which would not have been incurred except for the" exigencies of the service are "not intended to be compensatory in nature." *Id.* at 23. Like the foreign duty housing and cost-of-living allowance, the dislocation allowance "is not intended to be compensatory, but is made solely to insure that members of the uniformed services do not incur financial loss" as a result of personal actions dictated by national defense considerations. Rev. Rul. 1961-5, C.B. 1961-1, 8, 9.

That dislocation allowances were intended by Congress to be noncompensatory in nature is demonstrated by analysis of the legislative history of the provision. In response to a very strongly worded message from the President concerning the unfair financial burdens imposed upon our career military personnel by their frequent required moves, Congress passed the Career Incentive Act of 1955[8] which, *inter alia,* authorized dislocation allowances. Statistical surveys showed that servicemen were losing amounts averaging from $200 to $427 in "unavoidable expenses in connection with uprooting, transporting, and reestablishing a normal household" on permanent changes of station required by the services.[9] Dislocation allowances authorized by Congress and paid under appropriate regulations of the defense establishment are equal to one month's basic allowance for quarters for the grade of the serviceman entitled thereto. The allowance is paid only to a member of the armed forces whose dependents are authorized to and do move with him on a permanent change

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[8] H.R. Rep. No. 90, *supra* note 1, at 1 and *passim.*

[9] *Id.* at 11.

of station. As such, with minor exceptions, it is paid only to career enlisted men and officers.[10]

> "Thus the . . . (dislocation allowance) provides for a reasonable means of *partially reimbursing* a serviceman for expenses in connection with moving his family and household to a new duty station.'"[11]

Significantly, the President referred to the dislocation allowance as a "nonpay benefit . . ." in his message to Congress on the inadequacy of military pay and allowances. S. Rep. 125, 84th Cong., 1st Sess. 33 (1955). The intent of Congress, as found in the legislative history of the dislocation allowance, is clearly that it was not intended to be compensatory in nature.[12]

Furthermore, your office has held that a quarters allowance paid in addition to the basic allowance for quarters is excludable from gross income and, in the words of that holding,

> "since the instant allowance is paid as an additional . . . quarters allowance, it is clear that it is not a travel allowance of the kind includible in gross income under

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[10] See, e.g., Army Regulation 37-106, ch. 12-2a., "a member in pay grade E-4 with over 4 years of service or any higher grade is entitled to a dislocation allowance when the member is authorized transportation of dependents at Government expense in connection with a permanent change of station."

[11] H.R. Rep. No. 90, *supra* note 1, at 11 (emphasis supplied).

[12] The Internal Revenue Service even recognizes that where a payment made by a nongovernmental employer is not compensatory in nature, it is not income to the employee. See, *e.g.*, Rev. Rul. 62-113, C.B. 1962-2, 10. The courts go far beyond the Service's position on the excludability of reimbursements for extraordinary expenses connected with a move by an employee. See *John E. Cavanagh*, 36 T.C. 300 (1961) (Dec. 24, 841), *non acq.* 1962-1 C.B. 6: *followed, Kenneth D. England*, 641 USTC par. 9282 (S.D. Ill. 1964). *Cf. Walter H. Mendel*, 41 T.C. 32 (1963) (Dec. 26, 349).

section 1.61-2(b) of the regulations. Therefore, such allowance qualifies for exclusion from gross income under section 1.61-2(b) of the regulations."

Rev. Rul. 61-11, C.B. 1961-1, 9, 10; see *Clifford Jones*, 60 Ct. Cl. 552 (1925), T.D. 3724, C.B. IV-2, 136 (1925). Rev. Rul. 61-11 permitted the exclusion of a per diem allowance from gross income; certainly this holding clearly supports our alternative position that the dislocation allowance which is equal to one month's basic allowance for quarters need not be deemed a moving expense reimbursement to be excludable from gross income.

In the event that you adhere to the conclusion stated in Rev. Rul. 64-153 that dislocation allowances are includible in gross income, it is requested that consideration be given to applying the Ruling to taxable years beginning after May 25, 1964 only in view of the delay—over nine years—in issuing an adverse Ruling on this allowance. See 26 U.S.C. 7805(b). We further note that Rev. Rul. 64-153 merely states that a dislocation allowance "is includible in the gross income of the recipient" and does not hold that the allowance is compensation for personal services subject to withholding and inclusion in wages reported on withholding tax statements. *Cf.* Rev. Rul. 59-236, C.B. 1959-2, 234.

As indicated at the outset, a favorable resolution of this matter is imperative. Dislocation allowances will be paid to over 340,000 servicemen in fiscal year 1965 with an expenditure of over 40 million dollars. The compensation position of our personnel has been falling behind that of other governmental and industrial employees for some time.[13] If service people are deprived of the tax benefits which Congress considered in setting their rates of basic

[13] See, *e.g.*, S. Rep. No. 387, 88th Cong., 1st Sess. 5 (1963).

pay,[14] our whole system of compensation will have to be re-examined. Our retention rates of career people are already greatly reduced because of the frequent changes of their duty assignments made according to the needs of the services.[15] Placing a tax on their dislocation allowances serves only to reduce further an already inadequate allowance.[16] If Rev. Rul. 64-153 is not revoked a significant portion of the recently enacted 1964 pay raise will be lost before it is received. Unlike private industry the uniformed services cannot change their compensation policies in response to unfavorable tax developments.

The favor of an early reconsideration of the legal and policy implications of your Ruling is respectfully requested.

Sincerely,

NORMAN S. PAUL

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[14] See, *e.g.*, *Hearings on H.R. 3006* (To amend 37 U.S.C., etc.) (House Armed Services Comm.), 88th Cong., 1st Sess. 1423-1425 (1963).

[15] Id. *passim*.

[16] Note 11 *supra*.

EXHIBIT B

89TH CONGRESS 1ST SESSION H. R. 10607
IN THE HOUSE OF REPRESENTATIVES

AUGUST 23, 1965

MR. ROSENTHAL introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend the Administrative Expenses Act of 1946, as amended, to provide for reimbursement of certain moving expenses of employees, and to authorize payment of expenses for storage of household goods and personal effects of employees assigned to isolated duty stations within the continental United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (a) of section 1 of the Administrative Expenses Act of 1946 (60 Stat. 806, as amended; 5 U.S.C. 73b-1(a)), is amended by—

(1) striking the words "the Act of February 14, 1931" appearing in the first parentheses contained therein, and inserting in lieu thereof "section 4 of the Travel Expense Act of 1949 (63 Stat. 166, as amended; 5 U.S.C. 837)";

(2) striking the word "seven" appearing in the second parentheses contained therein, and inserting in lieu thereof the word "eleven";

(3) striking out of the first proviso contained therein the words "the Subsistence Expense Act of 1926 (5 U.S.C. 828)" and inserting in lieu thereof the words "section 5 of the Travel Expense Act of 1949 (63 Stat. 166, as amended; 5 U.S.C. 838)".

(b) Subsection (b) of section 1 of the Administrative Expenses Act of 1946 (60 Stat. 807, as amended; 5 U.S.C. 73b-1(b)), is amended by adding the following words immediately before the period at the end of the first sentence in the subsection ", except that payment of actual expenses may be made whenever, under regulations prescribed by the President, the head of the agency determines that such method of payment is more economical to the Government."

SEC. 2. The Administrative Expenses Act of 1946 (60 Stat. 806), as amended, is further amended by adding the following new sections:

"SEC. 23. Under such regulations as the President may prescribe and to the extent deemed necessary and appropriate, as provided therein, appropriations or other funds available to the departments for administrative expenses shall be available for the reimbursement of all or part of the following expenses of officers or employees for whom the Government pays expenses of travel and transportation under subsection (a) of section 1 of this Act:

"(1) The expenses of per diem allowance in lieu of the subsistence expenses of the immediate family of the officer or employee while en route between his old and new official stations, not in excess of the maximum per diem rates prescribed in or pursuant to section 3 of the Travel Expense Act of 1949 (63 Stat. 166, as amended; 5 U.S.C. 836).

"(2) The expenses of per diem allowance in lieu of subsistence of the officer or employee and his spouse, not in excess of the maximum per diem rates prescribed in the Travel Expense Act of 1949 (63 Stat. 166, as amended; 5 U.S.C. 836), and the expenses of transportation to seek permanent residence quarters at a new official station when both the old and new stations are located within the continental United States, excluding Alaska, provided that such expenses may be allowed only for one round trip in connection with each change of station of the officer or employee.

"(3) The subsistence expenses of the officer or employee and his immediate family for a period of thirty days while occupying temporary quarters when the new official station is located within the United States (including the District of Columbia, its territories and possessions, the Commonwealth of Puerto Rico, and the Canal Zone: *Provided,* That the period of residence in temporary quarters may be extended for an additional thirty days when the officer or employee moves to or from Hawaii, Alaska, the territories and possessions, the Commonwealth of Puerto Rico, and the Canal Zone, except that reimbursement for subsistence expenses actually incurred may not exceed an amount determined from such average daily rates per person as may be prescribed in such regulations, but not in excess of the maximum per diem rates prescribed in or pursuant to section 3 of the Travel Expense Act of 1949 (63 Stat. 166, as amended; 5 U.S.C. 836), for the localities in which the temporary quarters are located, for the first ten days of such period, two-thirds of such rates for the second ten days, and one-half for the balance of such period, including the additional thirty days.

"(4) The expenses of the sale of the residence (or the settlement of an unexpired lease) of the officer or employee at the old official station and purchase of a home at the new official station required to be paid by him when the old and new official stations are located within the United States (including the District of Columbia), its territories and possessions, the Commonwealth of Puerto Rico, and the Canal Zone, but reimbursement for brokerage fees on the sale of the residence shall not exceed such fees as are customarily charged in the locality where the residence is located and no reimbursement shall be made for losses on the sale of the residence. This provision applies regardless of whether the title to the residence or the unexpired lease is in the name of the officer or employee alone, in the joint names of the officer or employee and a member of

his immediate family, or in the name of a member of his immediate family alone.

"SEC. 24. Under such regulations as the President may prescribe and to the extent deemed necessary and appropriate, as provided therein, and notwithstanding other reimbursement authorized under this Act, an officer or employee who is reimbursed under section 1(a) or section 23 of this Act shall, if he has an immediate family, receive an amount equal to two weeks' basic compensation, or, if he does not have an immediate family, an amount equal to one week's basic compensation: *Provided,* That such amounts shall not exceed amounts determined from the maximum rate of grade GS-13 in the General Schedule of the Classification Act of 1949, as amended.

"SEC. 25. Under such regulations as the President may prescribe—

"(a) Whenever any civilian officer or employee (including any new appointee in accordance with section 7(b) of this Act, as amended) is assigned to a permanent duty station at an isolated location in the continental United States, excluding Alaska, to which he cannot take or at which he is unable to use his household goods and personal effects because of the absence of residence quarters at such location, nontemporary storage expenses or storage at Government expense in Government-owned facilities (including related transportation and other expenses), whichever is more economical, may be allowed such officer or employee under regulations issued by the head of the Executive Department or agency concerned. In no instance shall the weight of the property stored under this subsection, together with the weight transported under section 1 or section 7(b) of this Act, exceeded the total maximum weight the officer or employee would be entitled to have moved, and the period of nontemporary storage shall not exceed three years.

"(b) This section does not authorize reimbursement to officers and employees traveling under orders issued more than sixty days prior to the effective date of this section.

"SEC. 26. Under such regulations as the President may prescribe and notwithstanding the provisions of the fourth proviso of section 1(a) of this Act, in transfers between departments for reasons of reduction in force or transfer of function, expenses authorized under section 1, subsections (a) and (b) and subsections (e) and (f) other than expenses authorized in connection with transfers to foreign countries, and under sections 23 and 24 of this Act may be paid in whole or in part by the department from which the officer or employee is transferred or by the department to which he is transferred, as may be agreed upon by the heads of the departments concerned.

"SEC. 27. Under such regulations as the President may prescribe, a former officer or employee separated by reason of reduction in force or transfer of function who is reemployed within six months of the date of such separation by a nontemporary appointment at a different geographical location from that where such separation occurred may be allowed and paid the expenses authorized by section 1 of this Act, and may receive the benefits authorized by sections 23 and 24 of this Act, in the same manner as though he had been transferred to the location of reemployment from the location where separated in the interest of the Government without a break in service.

"SEC. 28. Notwithstanding the provisions of subsections (a) and (b) of section 1, and of sections 23, 24, 25, and 27 of this Act, the travel and transportation expenses, including storage of household goods and personal effects, and other relocation allowances shall not be allowed thereunder when a civilian officer or employee is transferred within the continental United States, excluding Alaska, unless and until such officer or employee shall agree in writing to remain in the Government service for twelve months follow-

ing his transfer, unless separated for reasons beyond his control and acceptable to the department or agency concerned. In case of violation of such agreement, any moneys expended by the United States under said sections of this Act on account of such officer or employee shall be recoverable from him as a debt due the United States."

SEC. 3. Regulations under this Act shall be prescribed within ninety days following the date of enactment but shall be retroactive to such date.

EXHIBIT C

THE WHITE HOUSE

TO THE CONGRESS OF THE UNITED STATES:

America expects—and receives—much from her public servants.

In every field of endeavor vital to the security of this Nation—from foreign affairs to science and technology to national defense—we depend on the career men and women of the Federal service for competence, devotion, loyalty, and responsibility.

I have been a part of this service for almost 35 years. I have seen it perform critical and vital tasks. Most of the time it has performed at its best—and that is the way we want it to stay.

I believe firmly that the merit system is the keystone of good government.

I believe that the public service is a profession of dignity, opportunity, and profound personal achievement.

I reject the proposition that government employment is somehow inferior to employment in business, in the professions, in university life, or in any other occupation. There can be no class system separating the men and women who are committed to the service of their fellow men or to the defense of their country.

I also believe strongly in the obligation of the Federal Government to be a good employer. And I define a good employer as one who

—demands excellence and rewards it

—is fair and just

—respects the dignity of his employees

—insists upon ethical standards and sets a good example

—practices no discrimination

—welcomes fresh ideas and new approaches

—fulfills his responsibilities to the community

—provides opportunities for growth and challenge

—combines prudent business judgment with enlightened policies on compensation and benefits.

We do not have two standards of what makes a good employer in the United States:—one standard for private enterprise and another for the Government. A double standard which puts the Government employee at a comparative disadvantage is short-sighted. In the long run, it costs more.

In all respects, save one, the Federal Government today is meeting the test of a good employer. In the last four years we have almost—but only almost—achieved adequate, up-to-date, and fair pay systems for all categories of Government personnel.

We must not cease our effort now.

In my Budget Message on January 25, 1965, I announced the appointment of a Special Panel on Federal Salaries to review Federal military and civilian pay levels.

That Panel presented its report to me on April 15. It is attached to this Message. I have been studying it carefully.

The report contains a series of recommendations concerning adjustment of Federal pay in the fiscal year 1966.

I endorse the proposals of the Panel and recommend early action by the Congress to authorize:

—An average increase of 3 percent in Federal civilian salaries.

—An average increase of 4.8 percent in compensation of all uniformed personnel, except enlisted personnel with under two years of service.

—A 2.7 percent increase in base pay of enlisted personnel with less than two years of service.

These proposed adjustments will restore the relationships between civilian and military pay established in 1963.

The adjustments will not bring us to full achievement of the comparability standard enunciated in the Federal Salary Reform Act of 1962, but they will prevent loss of ground already attained.

Before including the full effect in retirement plans, the proposed increases will have a total annual cost of approximately $853 million—$447 million for uniformed personnel and $406 million for civilian personnel. In order to hold the costs of pay adjustments in the fiscal year 1966 within amounts included in the Budget for that purpose, I recommend that the increases be made effective January 1, 1966.

Legislation to carry out these recommendations is attached. I ask that it be referred to the appropriate committees of the Congress for early consideration.

The pay adjustments proposed in this Message emphasize the obligation of the Federal Government to insist upon maximum return from every dollar spent on a salary.

All agencies of the executive branch are working hard to improve the productivity of their employees and to curtail outmoded activities. All agencies have established personnel control programs which should bring to a halt unwarranted increases in average grades and average salaries.

I am continuing my personal efforts to hold down employment. The most recent monthly report of the Civil Service Commission shows that there are now about 22,000

fewer civilian employees in the executive branch than in December, 1963.

New employees must replace many who leave, but additional employment will occur only when our responsibilities permit no other course of action.

I am proud of the progress we have made toward lean and fit competence in the discharge of Federal responsibilities. Adequate pay will help us to continue our advance toward that goal.

The report of the Panel proposes new procedures for acting upon compensation matters in the future.

The first proposal would establish a permanent mechanism for impartial review at four-year intervals of the structure and interrelationships of all Government salary systems. Following these reviews, the President would be authorized to propose changes in salary schedules for top positions in the executive, legislative, and judicial branches. The changes would go into effect automatically at a given date, unless disapproved by resolution of either House of the Congress. Other changes proposed by the President as a result of a quadrennial review would be acted upon through the regular processes for the enactment of legislation.

The second proposal would authorize a procedure for acting, between quadrennial reviews, upon such periodic adjustments in pay rates for Federal civilian and military personnel as may be warranted to keep pace with changes in pay rates elsewhere in the economy. Under this proposal, the President would continue to make prescribed reports annually to the Congress. When any such annual report includes recommendations for revision of salary rates, these revisions would go into effect automatically at a given date, unless disapproved by resolution of either House of the Congress.

I concur in these recommendations of the Panel.

Legislation to establish the first of these new and improved procedures is attached.

Amendments of existing law to make the second recommendation effective are included in the bills authorizing pay adjustemnts for civilian and uniformed personnel.

The civilian pay bill also includes an amendment of the Federal Salary Reform Act of 1962 which would carry out another of the Panel's recommendations. This amendment would give the President discretionary authority to make salary surveys and comparisons in additional fields of non-Federal employment.

Existing law limits the annual surveys and comparisons to "private enterprise." Collection and analysis of salary rate information in such fields of employment as State and local governments and non-profit institutions would give added assurance that Federal salary rates are kept in appropriate relationship with salary rates prevailing throughout our economy.

Drafts of legislation to carry into effect other important recommendations contained in the Panel's report will be promptly transmitted to the Congress. These drafts will propose to:

—Authorize certain civilian employees not now receiving premium pay for overtime to receive such pay on an equal basis with other civilian employees.

—Establish a coordinated and equitable system for payment of moving expenses to employees transferred for the convenience and benefit of the Government.

—Authorize payment of readjustment allowances to certain employees separated involuntarily from Federal employment through no fault of their own.

The report of the Special Panel and this Message largely take the place this year of the President's annual report

to the Congress, as required by the Federal Salary Reform Act of 1962. Nevertheless, the report and analysis of the Bureau of the Budget and the Civil Service Commission on the comparison of Federal and private enterprise salary levels, and the views of employee organizations, should be available to the Congress. I am transmitting them by separate communication.

With the enactment of the legislation recommended in this Message, we shall have taken still another series of steps in the most far-reaching revision of Federal compensation laws in the history of our country.

We shall be much nearer to full achievement of the comparability standard adopted by the Congress in 1962.

We shall have established for the first time sound procedures for maintaining interrelated salary systems for both civilian and military personnel, which will be based upon fair, clear, consistent, and up-to-date policies.

And we shall be in a far better position to attract and retain in Federal service the best talent in America.

I urge prompt consideration of these proposals. Their results will more than justify their costs.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 12, 1965.

EXHIBIT D

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C. 20415

May 20, 1965

Honorable John W. McCormack
Speaker of the House of
Representatives

Dear Mr. Speaker:

In accordance with the President's message of May 12, 1965, we are submitting with this letter, for the consideration of the Congress, proposed legislation which would authorize the reimbursement of certain of the moving expenses of civilian employees who are transferred in the interest of the Government to a place other than the one in which they have been living and working. There are enclosed a draft bill, a section analysis of the proposed bill, and a statement of purpose and justification.

The proposed bill covers four major types of employee moving expenses. First, with respect to transportation and storage of household goods, it would raise the current statutory limit on the weight of household goods shipped for which reimbursement can be made. Because of changes in the pattern of living of Federal employees in the nineteen years since enactment of the Administrative Expenses Act, the existing limit is not adequate to cover the weight of goods shipped by a substantial proportion of Federal employees. We believe that increasing the statutory weight limit from 7,000 pounds to 11,000 pounds will more adequately reflect these changing needs. The proposed bill would also allow agencies to choose whether to ship employees' goods by Government bill of lading or under the commuted rate system now generally used, whichever is more economical.

Employees or new appointees assigned to a permanent duty station at an isolated location in the continental United States (except Alaska) where there are no residence quarters other than barracks or furnished rooms, or the like, would be reimbursed for storage of household goods for up to three years or could have goods stored in Government owned facilities under regulations to be issued by the President. Alaska is excluded because storage of household goods for employees in Alaska is covered under Public Law 88-266.

Second, with respect to travel and subsistence allowances for employees and their families, the bill would permit reimbursement for the travel expenses of the immediate family while en route to the new official station (in addition to the cost of their transportation, which is already provided), round trip travel for the employee and his spouse to seek permanent quarters, and expenses while occupying temporary quarters for up to 30 days (or 60 days for certain locations where shipment of household goods takes more than 30 days).

All employees would not receive reimbursement for each of these types of expenses. Reimbursement would depend on actual expenses for these items, and would be limited by geographical considerations, except in the case of family travel to the new official station. Househunting trips would be limited to the continental United States (excluding Alaska). Subsistence for temporary quarters would be limited to non-foreign areas. Reimbursement would be at rates established by regulations of the President within per diem rates prescribed in or pursuant to section 3 of the Travel Expense Act of 1949, as amended.

Third, the proposed bill would permit reimbursement for certain costs of real estate transactions in accordance with regulations to be established by the President. Expenses the employee is required to pay in selling his home at the old official station (or settling an unexpired lease) and in

purchasing a home at the new official station could be reimbursed on an actual expense basis. Reimbursement would not be authorized for losses on the sale.

Fourth, employees would receive a flat allowance to cover miscellaneous expenses of their move not otherwise provided for. Single movers would receive an amount equal to one week's basic compensation, and employees with an immediate family would receive the equivalent of two week's basic compensation.

Although the bill is intended primarily for the benefit of civilian employees moving within the United States, a small number of employees engaged in overseas moves who are not covered by military or Foreign Service Act moving expense provisions would be covered under this bill.

They would not, however, be reimbursed under this bill for temporary quarters overseas. Also certain former employees whose moving expenses would have been paid if they could have been kept on the rolls until placed in a reduction-in-force or a transfer of function would be able to receive benefits under this bill if they obtained a nontemporary appointment to a Federal position within 6 months of their separation.

The Civil Service Commission is proposing this legislation both as a matter of equity to employees and as a matter of good administrative practice for Government. Underlying this proposal is the basic principle that when employees are transferred at the request of the Government the object is to improve the efficiency of the service. Transfers are usually made at Government convenience with respect to time, location, and frequency. Financial losses should, therefore, be largely assumed by the Government. A well-conceived and administered reimbursement plan will insure equitable treatment, encourage employees to transfer willingly, and implement internal promotion and career development programs.

We have data, obtained in a study of more than 5,000 employees, which clearly establishes that most Federal employees who move at the request of their agencies have to pay substantial costs of the types enumerated above out of their own pockets. This loss is not reimbursable despite the fact that the agency rather than the employee is both the initiator and the prime beneficiary of the move. We believe that this situation should be corrected, and that the Government should provide its employees more substantial protection against financial hardship resulting from moves they make at its request. While the proposed legislation does not assure the elimination of all losses, it is a major step forward.

Non-reimbursable costs of moving are significant deterrents to relocation for many employees. If experienced employees are unwilling or unable to take the financial loss, their agency loses their services. The agency may have to promote less well-qualified people or spend time and money finding, hiring, and training replacements. This is poor economy in the short run and is even poorer economy in the long run, for a reasonable degree of geographic mobility is an essential element in a sound career service.

The need for greater financial assistance to employees who move is increasing. For example, the current Department of Defense program to close certain installations may lead to a substantial number of employee moves. Other agencies have also been experiencing greater needs to shift employees as a result of automation or changing organizational requirements. Changes on such a scale will frequently be too large to permit absorption of excess employees into other Federal jobs in the community. In some cases, of course, the Federal establishment being closed is the only one of its kind in the vicinity. Therefore, employees may be faced with moves to distant places if they wish to continue their Federal careers. In these circumstances, it is difficult enough for employees and their

families to cut established ties and to resettle in an unfamiliar place without also having to pay out of their own pockets for ordinary, reasonable expenses associated with the move.

The proposed legislation should increase the acceptability of transfers necessary in the interest of the Government. It would bring Government's practices with respect to its civilian employees closer in line with the more progressive and realistic practices of private business. It deserves sympathetic consideration by the Congress.

In accordance with the provisions of the Act of July 25, 1956 (70 Stat. 652; 5 U.S.C. 642a), we estimate the Government-wide annual cost of the proposed legislation at about $22,000,000.

The proposed legislation will not involve any expenditure for personal services. Funds to pay the reimbursement authorized by the proposed legislation would be secured by the individual agencies through their regular appropriation requests to the Congress.

The Bureau of the Budget advises that enactment of the recommended bill will be consistent with the Administration's objectives.

A similar letter is being sent to the President of the Senate.

By direction of the Commission:

Sincerely yours,

(s) JOHN W. MACY, JR.
Chairman

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND and CONNIE J. ENGLAND,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MANUFACTURING CHEMISTS' ASSOCIATION, INC., AS AMICUS CURIAE, IN SUPPORT OF PETITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF MANUFACTURING CHEMISTS' ASSOCIATION, INC., AS AMICUS CURIAE

The Manufacturing Chemists' Association, Inc., appearing as *amicus curiae*, files this brief in support of petitioners. This brief is filed pursuant to Rule 42 of the REVISED RULES of the Supreme Court of the United States. Both counsel for petitioners and counsel for respondent have stated that the respective parties consent to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Manufacturing Chemists' Association is incorporated under the laws of the State of New York. It is a nonprofit membership corporation (New York) with 193 U.S. member corporations, large and small, which account for more than 90 percent of the productive capacity of the chemical industry in this country. Its by-laws require that eligible members shall be manufacturers of chemicals who sell to others a substantial portion of the chemicals they produce. The industry carries on its activities throughout the United States and in foreign countries.

All members of the Association are vitally interested in the issue involved herein, namely:

> "Whether an employee who is transferred to a new job location by and at the direction of his employer must include in gross income amounts received from his employer in reimbursement for extraordinary moving expenses necessarily incurred by the employee solely as a result of his job transfer. Alternatively, if the employee must include such reimbursed expenses in gross income, whether the employee is entitled to deduct such expenses as ordinary and necessary business expenses."

The question presented in this case deeply concerns the industry for the answer to it will have important consequences on future policies of its members with respect to relocation of its employees. Many thousands of employees of member companies are transferred during a calendar year and it is to be anticipated that the number of transfers will progressively increase. The membership of the Association is disturbed over

the results which will stem from the decision of the Seventh Circuit Court of Appeals. Whenever an employer relocates an employee financial hardships are sustained by the employee and reimbursements are made by the employer in order to protect the employee against these financial losses. By reaching the decision that these reimbursements are neither excludable from the gross income of the employee, nor deductible by him, the Seventh Circuit Court of Appeals takes away from the employee in taxes a substantial portion of the reimbursement and thereby prevents him from being made completely whole.

ARGUMENT

This Association endorses the arguments set forth in the Brief of the Petitioner. The Association wishes to emphasize the current inconsistent position of the Internal Revenue Service in its treatment of reimbursed expenses to employees required to relocate by their employers. Thus, certain reimbursements of moving expenses do not constitute compensation and are, therefore, excludable from gross income while others, regardless of any standard of reasonableness, are arbitrarily considered compensation.[1] There are many types of expenditures necessarily incurred in connection with transfers which are for the convenience of the employer, and they should all be treated similarly for tax purposes. Therefore, to the extent these expenditures are reasonable in amount, they should not, upon reimbursement, be considered compensation to the employee.

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[1] Rev. Rul. 54-429, 1954-2 C.B. 53; Rev. Rul. 65-158, IRB 1965-24, 6.

CONCLUSION

It is respectfully submitted that the issues presented are of extreme public importance so as to make it necessary for this Court to take jurisdiction.

Respectfully submitted,

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Dated: October 8, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND and CONNIE J. ENGLAND,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

Brief of the National Association of Manufacturers of The United States of America, as Amicus Curiae, In Support of Petitioners on Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief, in accordance with Rule 42 of the Revised Rules of the Supreme Court of the United States, as *amicus curiae,* in support of the Petitioner.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises, located throughout the United States. These concerns range from the very small to the very large and represent about 75 percent of the industrial employment in the United States.

Changing economic conditions frequently require employers to move employees from one business location to another in order to facilitate their business operations. The willingness and ability of their employees to make such moves is an important asset to these businesses.

The Association has an interest in this case by reason of the substantial effect that the decision of the United States Court of Appeals for the Seventh Circuit will have upon its members. If this decision is upheld, it will have a far reaching effect in its impact upon individual taxpayers, business costs and operations, as well as labor mobility and unemployment.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented Have a Substantial Effect Upon a Large Number of Taxpayers, and the Business of Both Private and Public Organizations.

The Petitioners' brief, and others snbmitted in this case, have pointed out the large number of taxpayers which will be affected by the decision. Large as these numbers are, the number of transfers will increase

even more as population increases and as the complexity and interdependence of business becomes greater.

These employees, for the most part, do not move at their own volition, but rather at the direction and for the benefit of their employers. The topmost levels of management are generally not involved. As the Petitioners' brief at Page 10 points out, based on a recent survey, the salary of most of these transferred employees is under $10,000 and about 93 percent of them earn under $15,000 per year.

While the financial losses of employees may be high (a 1963 Civil Service Survey reports that over 4 out of 5 Government employees lose money on such moves),[1] non-financial factors can be equally onerous. Well established family and community ties are broken, and there is uncertainty whether satisfactory new community relationships can be established.

The financial burden on transferred employees is demonstrated by the same Civil Service survey which showed that 17 percent of employees transferred had a loss of more than $1000, and there is every indication that corresponding figures from private industry are much higher. In addition, there are many other types of costs directly resulting from the move. The many costs involved are too well known to require elaboration here. They include costs in connection with the sale and purchase of a residence; such as, closing costs, utility connections, brokers' fees, and the other extraordinary expenses

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[1] Hearings on H.R. 10607 before a Subcommittee of the Committee on Government Operations of the House of Representatives 89th Congress, 1st Sess. September 1 and 14, 1965 at page 15.

incident to the move of a family. While such costs are not at issue in the England case, they unquestionably add substantially to the financial burden of such moves.

Employers with multiple plant or office locations find that it is essential to transfer employees from time to time and often in large numbers for various purposes: for example, to remedy labor shortages, satisfy new markets, adjust to product or technological changes and other conditions. When, in addition to the deterrents to moving which already exist, the employee must contribute, often substantially, to the cost of the move made at the direction and for the benefit of his employer, the reluctance to move is increased and the difficulty of meeting these objectives is compounded.

The imposition of tax on reimbursed moving expenses also constitutes an artificial restriction to improved efficiency and career advancement programs. The importance and magnitude of this was recently indicated with respect to government employees in a letter to the Congress commenting on a bill to reimburse government employees for certain moving expenses.[2] The Chairman of the Civil Service Commission, John W. Macy, Jr., said:

> "... Underlying this proposal is the basic principle that when the employees are transferred at the request of the government the object is to improve the efficiency of the Service ... if experienced employees are unwilling or unable to

[2] Letter from John W. Macy, Jr., Chairman of the United States Civil Service Commission, to the Honorable John W. McCormack, Speaker of the House of Representatives, dated May 20, 1965. See Hearings on H.R. 10607 at page 5 cited above.

> take the financial loss, their agency loses their services. The agency may have to promote less well-qualified people or spend time and money finding, hiring, and training replacements . . . a reasonable degree of geographic mobility is an essential element in a sound career service . . ."

The problems in the areas suggested by Chairman Macy are no less pressing, and in some ways more critical, for private employers.

II. The Decision of the Court of Appeals is in Conflict With the Decision of the Tax Court.

The Court of Appeals, below, decided in effect that all amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty, are includible in the gross income of the employee. The Tax Court in John E. Cavanagh[3] held that the reimbursement for "extraordinary" moving expenses necessarily incurred by the employee solely as a result of his job transfer are not includible in the employee's gross income.

There is no provision in the Internal Revenue Code of 1954 or the regulations issued thereunder which requires the inclusion in gross income of reimbursement for moving expenses to employees such as the Petitioners.[4]

However, the Internal Revenue Service as a matter of administrative action in Revenue Ruling 54-429, 1954-2 Cum. Bull. 53 excludes from gross income reimbursements for transportation of taxpayers and

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[3] John E. Cavanagh, 36 T.C. 300 (1961).

[4] Id.

their meals and lodging en route. In the same ruling the Service requires the inclusion in gross income of expenses of meals and lodging while awaiting permanent quarters to become available without stating whether such expenses were ordinary or extraordinary in the particular case.

The Tax Court in John E. Cavanagh (cited in footnote 4) upheld the ruling insofar as it considers the "en route" expenses as not includible in gross income. It held the ruling invalid to the extent it holds the extraordinary expenses of meals and lodging at the new site includible in gross income.

The Tax Court said that since expenses of both were "required to be incurred by the employer, they represent repayment to the employee of an amount he has first paid for and in behalf of his employer and do not constitute income to him." The Tax Court pointed out, however, that to the extent the reimbursement covered "the ordinary and necessary food and lodging costs of an employee they represent payment of an *employee's* living expense and are income to him."

Thus the expenses reimbursed did not reflect the expenses the employee would ordinarily have incurred for food and lodging, but were only the expenses that he incurred in excess of these amounts.

The same issue is found in this case. The trial court below, after discussing the Cavanagh case said, "Likewise, in the instant case, the expenses here in question were of an extraordinary nature required to be incurred by the employer and repaid by it."

There are compelling reasons why the reasonable and necessary reimbursements for a house hunting

trip and meals and lodging at a new site to the extent they exceed the ordinary living expenses of an employee, should not have different tax consequences to him from those of "en route" transportation expenses.

First, the expense of meals and lodging while awaiting availability of permanent quarters is a direct consequence of the move. Such expenses are no different than the "en route" expenses which are clearly excludible from gross income.

In an employer directed move, the employee has no control over whether he will incur expenses for meals and lodging while awaiting permanent quarters. Terms of real estate transactions, whether leases or purchase and sale agreements, do not necessarily provide for occupancy at a time which exactly coincides with the move. Frequently it is impossible for a transferred employee to sell one house and arrive with his household effects precisely at the date his new "home" is available. Since the employee cannot control whether the expense for meals and lodging at the site will be incurred, reimbursement for that expense should receive the same tax treatment as transportation or meals and lodging en route, which are also an inescapable consequence of the employer's decision to transfer the employee.

Second, the reimbursement is not compensation to the employee. Section 61(a)(1) of the Internal Revenue Code of 1954 provides that, "gross income means all income from whatever source derived, including (but not limited to) . . . compensation for services, including fees, commissions and similar items . . ."

Certainly the reimbursements in such cases have none of the ordinary characteristics of compensation.

The employer did not treat them as such in his records. And he did not withhold on amounts paid to the employee for these moving expenses. In no sense was the money paid as reimbursement for services to the employee. The employee did not receive an amount in excess of his costs, and this reimbursement was not received as a net gain or reward for moving. In effect, the employee acted as a conduit for the employer in paying these expenses.

Third, although the basis for the inclusion of these moving expenses in gross income is the general statutory language of Section 61(a) of the Code, which provides that "gross income means all income from whatever source derived . . .", nevertheless, in these circumstances there was no increase in wealth to the taxpayer; for, as stated by the trial court: "rather than an increase in wealth, the taxpayers in fact saw their financial situation worsened in carrying out the direct request of the husband's employer to make the move from Kansas City to Springfield."

Finally, these reimbursements fall within the policy guides of the Congress embodied in the Revenue Act of 1964, its first legislative action relative to the tax treatment of moving expenses, which provided partial relief for new and nonreimbursed employees.

The Court of Appeals said it disagreed with the District Court's conclusion as to Congressional intent. The Congress had been silent on policy relating to moving expenses until the Revenue Act of 1964. At that time it said that one of its prime considerations was the elimination of tax deterrents to labor mobility. The House Ways and Means Committee pointed out that one of their objectives in recommending the pas-

sage of the moving expense provisions of the Revenue Act of 1964 was to improve manpower utilization. The Committee report[5] said:

> "Your Committee believes that it is important to remove deterrents to the *mobility of labor*. Anything which can be done in this respect should aid in reducing local structural *unemployment*." (Emphasis supplied.) Almost identical language appears in the report of the Senate Finance Committee.[6]

While this policy was applied in that legislation to new and nonreimbursed employees, it has equal force when applied to reimbursed existing employees.

The Congress provided an opportunity to the Courts to take this policy as well as other factors into account in the ultimate disposition of the treatment to be afforded reimbursed employees. The same House and Senate Committee reports, in commenting on the tax treatment of reimbursed existing employees, said: "The question of . . . existing employees . . . is left for judicial interpretation."

Thus the Congress was seeking judicial determination of the issue in this case. In light of the conflict between the decision in the Seventh Circuit and the Tax Court described by the Petitioners, there is no satisfactory way of providing a uniform judicial interpretation short of the acceptance of jurisdiction by this Court.

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[5] H.R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).

[6] S. Rep. No. 830, 88th Cong., 2d Sess. 71 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the issues presented are important and merit review and determination by this Court. We urge, therefore, that the petition for a writ of certiorari be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 1b-21b) is reported at 226 F. Supp. 762. The opinion of the court of appeals (Pet. 1a-6a) is reported at 345 F. 2d 414.

JURISDICTION

The judgment of the court of appeals (Pet. 7a) was entered on April 29, 1965. On July 14, 1965, Mr.

Justice Clark extended the time for filing a petition for a writ of certiorari to September 24, 1965. The petition for a writ of certiorari was filed on September 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that amounts paid to petitioner by his employer to defray certain personal living expenses incurred by petitioner subsequent to his arrival at a new post of duty were taxable income.

2. Assuming that these amounts are includible in petitioner's gross income, whether he is entitled to deduct his corresponding expenditures as ordinary and necessary business expenses.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the relevant Revenue Rulings are set forth in the Appendix, *infra*, pp. 14-18.

STATEMENT

Petitioner [1] had been employed by Aetna Casualty and Surety Company at its Kansas City, Missouri, office for a period of seven years prior to 1960. In June 1960 Aetna transferred petitioner to Springfield, Illinois. He arrived in Springfield on June 19, 1960, and commenced work there the next day.

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[1] Connie J. England, petitioner's wife, is a party to these proceedings because a joint return was filed.

Pursuant to its established policy, Aetna reimbursed petitioner (1) for the cost of transporting himself, his wife and his belongings from Kansas City to Springfield and (2) for certain personal expenses incurred by petitioner after his arrival in Springfield. Petitioner did not report any of the reimbursement as income in his 1960 tax return. The Commissioner did not attempt to tax petitioner on the first category of reimbursements—*i.e.*, the cost of transporting himself, his family and belongings from the old to the new post of duty. The present case concerns the Commissioner's attempt to tax the second category of reimbursements—*i.e.*, expenses incurred by petitioner after arrival in Springfield but before moving into his new house, totalling $446—including the following (Pet. 4b, fn. 1):

(1). Meals and lodging for the period June 19 to August 1, 1960.

(2). Laundry and cleaning expense for the period June 19 to August 1, 1960.

(3). Telegram from Springfield to Kansas City confirming the sale of petitioner's house.

(4). Newspaper advertisement seeking to rent a house in Springfield.

(5). Dinner and entertainment for the employee petitioner replaced.

(6). Petitioner's wife's trip from Kansas City to Springfield to inspect prospective homes.

(7). Boarding of petitioner's dog and cat.

(8). Cost of bringing title to date on petitioner's house

(9). Revenue stamp.

Petitioner paid the tax under protest and brought the present suit for refund. The district court decided in favor of petitioner; the court of appeals reversed (Pet. 1a-6a, 1b-16b).

ARGUMENT

The decision of the court below is correct; it does not conflict with any other appellate decision; and there is no need for further review by this Court.

1. The Commissioner long ago made a careful examination of the questions presented here—whether an employee who, at the request of his employer, moves from one city to another receives taxable income if the employer reimburses him for expenses incurred in connection with the move, and, if so, whether the employee is entitled to claim an offsetting deduction by treating the costs that were reimbursed as deductible business expenses. The Commissioner concluded that any amounts received by an employee as reimbursement for the expenses of moving himself, his family and his belongings from one post of duty to another, including the cost of meals and lodging in transit (herein referred to as direct moving expenses), do not constitute taxable income to the employee, but that amounts received as reimbursement for other expenses related to the move do constitute income to the employee, and that no offsetting deduction is allowable. Rev. Rul. 54-429, 1954-2 Cum. Bull. 53 (App., *infra*, pp. 15-18); see also, Rev. Rul. 64-153, 1964-1 Cum. Bull. (Part 1) 70; Rev. Rul. 65-158, 1965-1 Cum. Bull. 34.

We believe that the line drawn by these rulings—*i.e.*, excluding from income amounts received as reimbursement for direct moving expenses but including in income amounts received as reimbursement for the many other indirect expenses occasioned by the move—represents a reasonable and practical resolution of a difficult administrative problem. The rulings reflect an accommodation between two basic principles of the Code. On the one hand, an employee should not have to pay tax on an expenditure by his employer which primarily benefits the employer. On the other hand, the employee should pay a tax on any expenditure by the employer which primarily benefits the employee personally.[2] As discussed *infra*, p. 9, every appellate court to consider the question has accepted the Commissioner's long-standing position.

The indirect expenses associated with moving are subject to great variation, depending on the personal preferences of the employee and the generosity of the employer. For example, one employee may, solely because of the move, feel constrained to hire domestic help to aid in packing, unpacking and getting settled; another employee may think that the new house requires a different style of drapes, rugs, and furnishings than his old house; a third may insist

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[2] It makes no difference whether the employer pays the expense directly or reimburses the employee who has paid the expense. For example, if an employee runs up a $100 personal grocery bill, the employee will be taxed on $100 of income regardless of whether the employer pays the grocer or reimburses the employee who has paid the grocer.

on new wallpaper and chandeliers. Of course, all of these decisions will depend on the employee's personal tastes and desires; none can be regarded as primarily for his employer's convenience, even though incurred solely as a result of the move which his employer required him to make.[3]

Congress expressly prohibited taxpayers from deducting any "personal, living, or family expenses" (1954 Code, § 262), and it is quite clear that it did not intend this provision to be circumscribed by having an employee exclude from his income reimbursements for personal expenses, even though the personal expenditure was required by the taxpayer's employer and essential to retaining his employment. For example, a given corporation may require its salesmen or executives to don a clean shirt every day, to wear expensive suits, to drive a certain make of automobile, or to live in a certain fashionable suburb. Even though the employee proves that but for his employer's requirements he would not have spent as much on his clothes, car or home, no part of these costs is deductible. Although expenditures of this kind may be helpful in furthering the taxpayer's business (of being an employee) and he may have made them primarily for business rather than personal reasons, the relationship between the ex-

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[3] For example, in the instant case petitioner was reimbursed for, *inter alia*, expenditures for meals, lodging and laundry from the time he moved to Springfield, his new post of duty, until the house of his choice was ready for occupancy, the cost of boarding his dog and cat, and certain entertainment expenses.

penditure and the taxpayer's business is too intangible and remote to qualify them as deductible business expenses. In the end, they are more accurately described as "personal, living, or family expenses" which the Code specifically makes non-deductible. 1954 Code, § 262. Moreover, if, instead of paying the employee a gross salary, the employer segregates monthly compensation into clothes reimbursement, automobile reimbursement, home reimbursement, and labels only the remainder as salary, the entire amount will nevertheless remain taxable.

Similarly, if an employee is reimbursed for essentially personal expenses connected with his move, the reimbursement is not excludible from income merely because the expense would not have been incurred but for the move. Petitioner's argument, based as it is on the fact that the move was employer-directed, thus focuses on the wrong question. An employer may pay a particular employee a bonus in order to induce him to move, but the bonus would nevertheless be taxable income. The same result holds true if, in order to induce an employee to remain in his employ and to make the desired move, an employer pays some of the employee's personal expenses.

Section 61(a) of the Code defines gross income as including "all income from whatever source derived * * *." This definition was intended by Congress to be "all-inclusive" (*Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 432) and is clearly broad enough in scope to embrace amounts paid by an employer to reimburse his employee for personal living expenses

occasioned by the employee's transfer from one post of duty to another. The only substantial question is whether the Commissioner and the courts must scrutinize each reimbursed expenditure to ascertain whether it is essentially intended to benefit the employer (other than by inducing the employee to continue working for him—as do all salary payments) or whether it is essentially intended to reimburse the employee for personal, living or family expenses.

Petitioner and the briefs of *amici curiae* point out that various large American companies who move hundreds of thousands of their employees annually reimburse them for varying amounts of indirect moving expenses. Obviously, a very heavy administrative and judicial burden would be imposed if it became necessary to examine each reimbursed expenditure and to weigh its respective business and personal aspects. The matter is one which is peculiarly appropriate for exercise of the rule-making power, and we submit that the Commissioner validly exercised his authority in establishing the long-standing rule that only the direct expenses of moving to a new post of duty—*i.e.*, the cost of transporting the employee, his family and his belongings, including the cost of meals and lodging in transit—will be excluded from an employee's income, and that any reimbursement of the innumerable types of indirect expenses—depending as they do on the employee's personal tastes and the employer's generosity—will constitute income. Since the rule is both reasonable and workable, the court below correctly rejected peti-

tioner's argument that the Commissioner and the courts must make an individual examination of the facts of each employee's particular case to determine whether each expenditure related to the move primarily benefitted the employer or the moving employee.

2. Every appellate court that has considered the proper tax treatment of indirect moving expenses has held that they constitute non-deductible personal, living, or family expenses, and that any reimbursement received with respect to such expenses is includible in income. In fact, every principle announced in Revenue Ruling 54-429 has now been tested and upheld by at least two courts of appeals. See *York* v. *Commissioner*, 160 F. 2d 385 (C.A.D.C.); *Commissioner* v. *Mendel*, C.A. 4, No. 9904, decided October 8, 1965; *United States* v. *Woodall*, 255 F. 2d 370 (C.A. 10); *Koons* v. *United States*, 315 F. 2d 542 (C.A. 9); *Light* v. *Commissioner*, 310 F. 2d 716 (C.A. 5). See also *Bradley* v. *Commissioner*, 324 F. 2d 610 (C.A. 4). The only contrary precedent, the Tax Court's decision in *Cavanagh* v. *Commissioner*, 36 T.C. 300, was ignored by the Court of Appeals for the Fifth Circuit in *Light* v. *Commissioner*, *supra* (although called to that court's attention); questioned by the Court of Appeals for the Fourth Circuit in *Commissioner* v. *Mendel*, *supra*; and specifically disapproved by the Seventh Circuit in the instant case. There is thus no conflicting appellate decision.

3. Moreover, Congress recently considered the deductibility of moving expenses and explicitly approved the Commissioner's traditional approach. As explained above, the Commissioner had ruled that an

employee's reimbursement for his direct moving expenses (transportation of himself, his family and his belongings, and meals and lodging en route) does not constitute taxable income. However, the Commissioner had denied deductions to employees who paid their own moving expenses (and received no reimbursement). In order to equalize the tax treatment between employees who paid their own moving expenses and those who were reimbursed, Congress added § 217 to the Code in 1964. That section permits an employee to deduct his costs "of moving household goods and personal effects from the former residence to the new residence and * * * of traveling (including meals and lodging) from the former residence to the new place of residence." The Committee Reports make it clear beyond doubt that the section does not permit any deduction for indirect moving expenses of the type here in issue:

> * * * Expenses of traveling do not include living expenses following the date of arrival at the new place of residence, living expenses preceding the date of departure for the new place of residence, expenses of house or apartment hunting, or expenses of trips for purposes of selling property. [H. Rep. No. 749, 88th Cong., 1st Sess., p. A58.]

To be sure, Congress was dealing only with the deductibility of moving expenses and the exclusion of reimbursed expenses from income was "left for judicial interpretation." H. Rep. No. 749, 88th Cong., 1st Sess., p. 59. However, the reasons that prompted the enactment of § 217 show that petitioner's argument in the instant case does not square with the

principles governing moving expenses in post-1964 years. Had petitioner's argument been accepted by the court of appeals, the very discrimination which Congress sought to eliminate by the enactment of § 217 would have been recreated.[4]

4. Petitioner asserts (Pet. 16) that there is a conflict in views among the courts of appeals with respect to the meaning of the word "home" in Section 162(a)(2)'s provision for the deduction of "traveling expenses * * * while away from home in the pursuit of a trade or business * * *." However, the reimbursed expenses here in issue were not traveling expenses and thus the meaning of the word "home" is not presented by this case.

Section 162(a)(2) is limited to those who travel temporarily to other areas, and such controversy as exists among the courts of appeals concerns the identification of the "home" of employees who are forced

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[4] The brief filed by the Associated Industries of New York State, Inc., as *amicus curiae*, discusses H.R. 10607, 89th Cong., 1st Sess., (favorably reported by the House Committee on Government Operations on October 21, 1965, H. Rep. No. 1199, 89th Cong., 1st Sess.). That bill, if enacted into law, will provide government employees with reimbursement for living expenses occasioned by their transfer from one post to another but does not affect the tax treatment of such reimbursements. See Rev. Rul. 64-153, 1964-1 Cum. Bull. (Part 1) 70. Indeed, the present Congressional consideration being accorded to expenses of transferred government employees, as well as Congress' recent enactment of Section 217 of the Internal Revenue Code, would suggest that Congress, rather than the courts, is the appropriate forum to initiate a change in the tax treatment of reimbursed living expenses.

to do a great deal of *temporary* travel.[5] In this case it is conceded that petitioner was "permanently transferred" (Pet. 4). Accordingly, the expenses are not "traveling expenses * * * while away from home" but living expenses occasioned by the change of petitioner's home. There is no conflict of decisions between the court below and any other court of appeals concerning the deductibility of the expenses at issue.[6]

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[5] Of the three cases cited by petitioner (Pet. 16, fns. 31, 32) as creating a conflict, all involved the problem of identifying the "home" of an individual whose occupation required extensive but temporary travel. *Burns* v. *Gray*, 287 F. 2d 698 (C.A. 6), involved a racehorse starter and racing official; *Wright* v. *Hartsell*, 305 F. 2d 221 (C.A. 9), involved a construction worker; and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.A. 9), involved a movie actress. None of these cases concerns the type of living expenses incident to a transfer that is involved here.

[6] We note that none of the three cases claimed by petitioner to conflict with the lower court's decision was relied upon by him in the court below or cited to that court.

CONCLUSION

The decision of the court of appeals is correct. It is in accord with the Commissioner's long-standing and reasonable administrative rulings which have been uniformly accepted by every federal appellate court to consider them and utilized by Congress in providing for the post-1964 deductibility of moving expenses. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1965.

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * * *

[26 U.S.C. 61.]

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * *

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

* * * *

[26 U.S.C. 162.]

SEC. 217 [as added by Sec. 213(a)(1), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, 50-51]. MOVING EXPENSES.

(a) *Deduction Allowed.*—There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(b) *Definition of Moving Expenses.*—

(1) *In general.*—For purposes of this section, the term "moving expenses" means only the reasonable expenses—

(A) of moving household goods and personal effects from the former residence to the new residence, and

(B) of traveling (including meals and lodging) from the former residence to the new place of residence.

* * * *

[26 U.S.C. 217.]

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

[26 U.S.C. 262.]

Rev. Rul. 54-429, 1954-2 Cum. Bull. 53:

Regulations 118, Section 39.22(a)-2: Compensation for personal services. (Also Section 24 (a), Section 39.24(a)-1.)

Where an employee is transferred in the interest of his employer from one official station to another for permanent duty, the allowance or reimbursement received for moving himself, his immediate family, household goods and personal effects is not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expended for such purpose. Any excess of the allowance or reim-

bursement over the actual expenses incurred for such purpose is includible in his gross income. Any moving expenses paid or incurred by the employee in excess of the allowance or reimbursement is not deductible for Federal income tax purposes.

O.D. 1135, C.B. 5, 174 (1921) and I.T. 3022, C.B. XV-2, 76 (1936), modified.

Reconsideration has been given to the position of the Internal Revenue Service relative to the treatment, for Federal income tax purposes, of amounts received by an employee, representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in the case of a transfer, in the interest of his employer, from one official station to another for permanent duty.

O.D. 1135, C.B. 5, 174 (1921), holds that transportation charges paid by the Government on account of the transportation of the families of Army officers are in the nature of additional compensation and as such must be included in gross income. I.T. 3022, C.B. XV-2, 76 (1936), similarly holds that the cost of transportation of dependents of officers and enlisted men of the Coast Guard which is paid by the Government must be reported as taxable income, and no deduction therefor may be allowed in computing net income. However, in G.C.M. 18430, C.B. 1937-1, 137, it is held that where an employee of the State Department is transferred from one foreign post of duty to another for the convenience of the Government, the amount received by him as reimbursement of cost of transportation for himself and family should not be included in gross income.

Section 22(a) of the Internal Revenue Code of 1939 provides in part as follows:

> *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid * * *.

The payment or reimbursement by an employer of the cost of moving an employee, his immediate family, household goods, and personal effects from one place of employment to another permanent place of employment, primarily for the benefit of the employer, is not compensatory in nature. There is no essential difference between a payment of such cost directly by the employer and the payment by the employee and subsequent reimbursement by the employer.

Accordingly, it is concluded that (1) amounts received by an employee from his employer representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer, from one official station to another for permanent duty, do not represent compensation within the meaning of section 22(a) of the Code, and are not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expended for such purposes; (2) any excess of the allowances or reimbursements over the actual expenses incurred is includible in the employee's gross income; and (3) any moving expenses paid or incurred by the employee in excess of the allowances or reimbursements are not deductible for Federal income tax purposes, since they rep-

resent personal, living or family expenses within the meaning of section 24(a) of the Code. In any case in which the transfer is made primarily for the benefit of the employee, any allowance or reimbursement received by the employee is includible in his gross income.

Amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee.

O.D. 1135, C.B. 5, 174 (1921), and I.T. 3022, C.B. XV-2, 76 (1936), are modified to the extent that they are inconsistent with the views expressed herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND and
CONNIE J. ENGLAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE RESPONDENT

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REPLY TO BRIEF FOR THE RESPONDENT

In the petition for a writ of certiorari, petitioners emphasized that the tax treatment of employer-reimbursed moving expenses affects hundreds of thousands of employees annually, and that many thousands of these employees may be irreparably damaged unless this Court resolves the issue promptly (Pet. 6-12). Respondent does not question this statement. Indeed, respondent has explicitly conceded the widespread effect and importance of this case (Resp. 8). Nevertheless, respondent has urged this Court to deny the petition.

1. Respondent's principal argument is that the Commissioner of Internal Revenue "validly exercised" his rule-making power in ruling that certain reimbursed expenses are includible in income as a matter of law (Resp. 8).[1] This argument has two deficiencies.

[1]Respondent also states that the Commissioner's rules date back to Rev. Rul. 54-429, 1954-2 C. B. 53. In fact, Rev. Rul. 54-429 only incidentally dealt with the includibility in income of reimbursed expenses of the type here involved, and the Tax Court in *John E. Cavanagh* was uncertain whether it was agreeing or disagreeing with the ruling. See 36 T. C. 300, 304 (1961). Only after the decision in the Court of Appeals below did the Commissioner publish an unequivocal ruling on the subject. Rev. Rul. 65-158, I. R. B. 1965-24, 6.

First, the argument ignores the fact that the Commissioner's ruling has "no more binding or legal force than the opinion of any other lawyer." *United States* v. *Bennett,* 186 F. 2d 407, 410 (5th Cir. 1951); *Kaiser* v. *United States,* 262 F.2d 367, 370 (7th Cir. 1958), *aff'd,* 363 U. S. 299 (1960).[2] And like the opinion of any other lawyer, the Commissioner's ruling does not eliminate the need for definitive guidance from this Court.

Secondly, the Commissioner's ruling position is arbitrary—and wrong. It would treat reimbursements for certain expenses as excludable from income—because incurred primarily for the benefit of the employer—while treating reimbursements for other expenses as includible—although similar in nature and likewise incurred primarily for the employer's benefit. No such arbitrary rule can be justified in the name of administrative convenience. There is no reason why here, as in other areas of tax law, the application of governing criteria to particular reimbursements should not properly be left to the income tax audit process. The function of this case is to establish such governing criteria.

2. Respondent suggests that appellate courts in addition to the Court of Appeals below have considered the issue herein presented, but such is not the case. Of the decisions cited by respondent, *United States* v. *Woodall,* 255 F. 2d 370 (10th Cir.), *cert. denied,* 358 U. S. 824 (1958); and *Koons* v. *United States,* 315 F. 2d 542 (9th Cir. 1963), involved reimbursed moving expenses of new employees. *Bradley* v. *Commissioner,* 324 F. 2d 610 (4th Cir. 1963), involved reimbursement to a new employee for a loss on the sale of his house. Since a move by a new employee is not made at the direction and in the interest of the employer, reimbursements to new employees have always been con-

[2] See also *Biddle* v. *Commissioner,* 302 U. S. 573, 582 (1938).

sidered taxable.[3] *Commissioner* v. *Mendel,* 4th Cir. No. 9904, decided October 8, 1965, and *York* v. *Commissioner,* 160 F. 2d 385 (D. C. Cir. 1947) dealt with the deductibility of unreimbursed moving expenses, an issue far different from the includibility in income of reimbursed moving expenses. See Rev. Rul. 54-429, 1954-2 C. B. 53. And *Light v. Commissioner,* 310 F. 2d 716 (5th Cir. 1962), was a *per curiam* affirmance of a Tax Court decision argued and decided on the question of whether reimbursed expenses which taxpayer included in income were deductible by him as travel expenses while away from home.[4]

3. Respondent also suggests that it was the implicit intent of Congress when it added section 217 to the 1954 Code that reimbursed expenses of the type present here and in *John E. Cavanagh*[5] should be includible in income. Such suggestion cannot stand up in view of the fact that Congress expressly acknowledged existence of the *Cavanagh* decision and stated that the extent of "the exclusion for *existing* employees . . . is left for judicial interpretation"[6] (emphasis added).

4. Respondent rejects the existence of any appellate conflict here involving interpretation of the word "home" as used in section 162(a)(2) of the 1954 Code, because the context in which the issue was presented in this case differed from the circumstances of other cases. However,

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[3]*Compare* Rev. Rul. 54-429, 1954-2 C. B. 53, *with* Rev. Rul. 55-140, 1955-1 C. B. 317 and Rev. Rul. 59-236, 1959-2 C. B. 234.

[4]The suggestion that the reimbursed expenses should not have been included in income was presented only in a supplemental brief filed in the Court of Appeals to ask that the case be remanded for a determination of whether the expenses reimbursed were "extraordinary" within the *Cavanagh* doctrine. The Court of Appeals apparently viewed the issue as not timely raised and did not deal with it.

[5]36 T. C. 300 (1961).

[6]S. Rep. No. 830, 88th Cong., 2d Sess. 71-72 (1964); H. R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).

the situations in which this issue arises generally vary. The significant fact is that the Court of Appeals below held that a taxpayer's "home" is necessarily his place of business; other courts of appeals have disagreed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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